No. 00-1831-CFX Title: United States, Petitioner
v.
Sandra L. Craft

Docketed: June 8, 2001 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Jun 8 2001	Petition for writ of certiorari filed. (Response due August 7, 2001)
	Jun 8 2001	Appendix of petitioner filed.
	Jul 5 2001	Order extending time to file response to petition until August 7, 2001.
	Aug 7 2001	Brief of respondent Sandra L. Craft in opposition filed.
	Aug 22 2001	DISTRIBUTED for Conference of September 24, 2001
	Aug 23 2001	Reply brief of petitioner United States filed.
	Sep 25 2001	Petition GRANTED. SET FOR ARGUMENT January 14, 2002. **********
	Nov 9 2001	Joint appendix filed.
	Nov 9 2001	Brief of petitioner United States filed.
	Nov 29 2001	Record filed.
	Dec 3 2001	CIRCULATED.
	Dec 10 2001	Brief of respondent Sandra L. Craft filed.
	Jan 4 2002	Reply brief of petitioner United States filed.
	Jan 14 2002	ARGUED.
	Jan 15 2002	Letter from the Solicitor General received and distributed.
	Jan 15 2002	Letter from counsel for the respondent received and distributed.

Supreme Court, U.S.
FILED

001831 JUN - 8 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal tax lien that arises by operation of law in "all property and rights to property" of a delinquent taxpayer (26 U.S.C. 6321) attaches to the rights of that taxpayer in property held in a tenancy by the entirety.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-41a, 44a-69a) are reported at 140 F.3d 638 and 233 F.3d 358. The opinions of the district court (App., *infra*, 70a-93a, 95a-104a) are reported at 74 A.F.T.R.2d (RIA) 6362, 76 A.F.T.R.2d (RIA) 7447, and 65 F. Supp. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2000. App., *infra*, 42a. The petition for rehearing was denied on March 16, 2001. App., *infra*,

43a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 6321 of the Internal Revenue Code, 26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

STATEMENT

1. a. Don Craft failed to file federal income tax returns for the years 1979 through 1986. In 1988, the Internal Revenue Service assessed $482,446 in unpaid income tax liabilities owed by him and demanded payment. App., *infra*, 45a. When Mr. Craft failed to pay these taxes, the federal tax lien attached by operation of law to "all property and rights to property" in which he owned any interest. 26 U.S.C. 6321. Notice of the federal tax lien was filed on March 30, 1989, in the county of his residence. App., *infra*, 45a.

b. Sandra L. Craft is the wife of Don Craft and the respondent in this case. In 1972, Don and Sandra Craft purchased real property in Grand Rapids, Michigan, as tenants by the entirety. App., *infra*, 45a. On August 28, 1989, after the notice of tax lien had been filed for the taxes owed by Don Craft, the Crafts jointly executed a quitclaim deed that purported to transfer this property solely to Sandra Craft for one dollar. *Id.* at 70a. When she thereafter attempted to sell the

property in 1992, a title search revealed the government's lien. The Internal Revenue Service agreed to release the tax lien from this property so that the sale could be made, with the stipulation that half of the net proceeds—amounting to $59,944.10—were to be held in escrow pending a final determination of the rights of the parties. *Id.* at 45a-46a.

2. Sandra Craft then brought this action to quiet title to the escrowed proceeds. The government asserted in its answer (i) that the federal tax lien attached to Don Craft's interest in the property when it was held by the Crafts as tenants by the entirety, (ii) that when the property was conveyed to respondent it remained subject to the government's lien and (iii) that the government is therefore entitled to one-half of the sale proceeds. The government further asserted that Don and Sandra Craft's purported conveyance of the property to Sandra Craft was invalid as a fraud on creditors.

The district court granted the government's motion for summary judgment. The court held (i) that the conveyance of the property to respondent terminated the tenancy by the entirety, (ii) that, at that moment, each spouse took an equal one-half interest in the estate and (iii) that the government's lien attached to Don Craft's one-half interest in the estate at that time and remained attached to the property throughout any subsequent transfers. App., *infra*, 104a. The court concluded, however, that the tax lien attached only to the value of Don Craft's interest as of the date of the Crafts' conveyance of the property to respondent and not to any appreciation of that property's value that occurred subsequent to that date. *Id.* at 46a-48a, 104a.

3. a. Both parties appealed. App., *infra*, 44a. On respondent's appeal, the court of appeals reversed the determination of the district court that the tax lien

attached to the property.[1] Relying on that circuit's earlier decision in *Cole* v. *Cardoza*, 441 F.2d 1337 (6th Cir. 1971), the panel majority held that Don Craft never had an attachable interest in the property held in a tenancy by the entirety—either prior to, or at the transitory moment of, the conveyance to respondent. App., *infra*, 54a-56a. In reaching that conclusion, the majority relied on the common-law fiction, adopted in Michigan, that property held in a tenancy by the entirety is not owned by either of the spouses but is instead owned by the "marital unit." The court concluded that the husband (who owed the taxes) had no separate interest in entirety property to which the tax lien could attach. *Ibid.* Since Michigan law exempts property held in a tenancy by the entirety from seizure by creditors for the debts of only one spouse, the majority concluded that this property was exempt from the federal tax lien for the separate tax debt of one spouse. *Id.* at 57a-58a.

According to the panel majority, the decisions of this Court in *United States* v. *Irvine*, 511 U.S. 224 (1994), and *United States* v. *Rodgers*, 461 U.S. 677 (1983), have no effect "on the government's ability to attach a lien to an entireties estate, because these cases do not alter the basic tenet that state law governs the issue of whether any property interests exist in the first place." App., *infra*, 55a. The court remanded the case for consideration of the fraudulent conveyance issue which had not been addressed by the district court. *Id.* at 58a.

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[1] As a result of that ruling, the court of appeals did not consider the government's appeal of the district court's determination that the tax liens did not attach to any appreciation occurring after the Crafts' conveyance of the property to respondent.

b. Judge Ryan concurred in the remand but dissented from the majority's conclusion that a spouse's interest in entirety property is not "property or rights to property" to which the federal tax lien may attach. App., *infra*, 69a. He concluded that each spouse has valuable, legally-protected rights in property held in a tenancy by the entirety to which the tax lien attaches as a matter of federal law: in particular, each spouse has the right to share in the proceeds of any sale or lease of the property and the right to the entire property if the other spouse predeceases him. *Id.* at 61a. Judge Ryan added that this Court's decisions in *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), and *United States* v. *Irvine*, *supra*, make it clear that the state legal fiction that the husband and wife are a single entity—and the associated fiction that neither has any separate interest in entirety property—cannot be interposed to preclude the operation of the federal lien (App., *infra*, 63a-64a):

> As the Supreme Court has made clear, such state-law fictions, while they are perhaps valid defenses against state-law creditors, have no effect on an IRS lien. For example, in *National Bank of Commerce*, the fact that no Arkansas creditor could reach funds of a taxpayer-debtor that were held in a joint account with other nondebtor individuals did not prevent the IRS from attaching the entire account.
> * * *
>
> Although the majority disagrees, I am satisfied that *United States* v. *Irvine*, 511 U.S. 224 (1994), also undermines Sandra Craft's position. In *Irvine*, the Court reiterated that legal fictions—although valid protection from creditors under state law—could not be used to avoid federal tax liabilities.

Judge Ryan noted, moreover, that the majority opinion "not only contravenes established precedent," it also "provides an avenue for easy avoidance of federal income-tax laws." *Id.* at 69a.[2]

4. On remand, the district court concluded that when, as here, property is made exempt from the claims of creditors under state law, a conveyance of that property cannot be a fraudulent transfer under state law. App., *infra*, 79a-85a. The court stated, however, that this "no-harm-no-foul rule" is inapplicable when the debtor, while insolvent, places non-exempt funds beyond the reach of his creditors by using them to enhance exempt property. *Id.* at 85a-86a. Since Don Craft had enhanced the value of the property by making mortgage payments while he was insolvent, the court held that the government is entitled to a lien on his share of the sale proceeds to the extent of the enhanced value—which the court concluded was $6693. *Id.* at 86a, 92a.[3]

5. Both parties again appealed. App., *infra*, 1a-2a. The government also petitioned the court of appeals for

[2] Judge Ryan was of the view that the federal tax lien would not follow the property after its transfer to respondent unless that transfer was set aside as fraudulent. See App., *infra*, 69a-70a. He concurred in the remand solely for the purpose of determining whether Don and Sandra Craft's transfer of the property for $1 to Sandra Craft as sole owner constituted a fraud on creditors. *Id.* at 70a.

[3] This figure included only the portion of the mortgage payments that had been applied to reduce the principal balance of the loan. The district court rejected the government's additional claim to recover the far greater interest payments, as well as local ad valorem property tax payments, that Don Craft made over the years with the untaxed income that generated the tax liability in the first place. App., *infra*, 92a-93a.

hearing en banc on the ground that the decision in *Craft I* conflicted with the relevant decisions of this Court. The court of appeals denied that petition in December 1999. App., *infra*, 6a.

a. The panel to which the appeal was assigned concluded that it was bound by the prior decision in *Craft I* and dismissed the government's appeal.[4] App., *infra*, 2a. The panel stated that it was bound by *Craft I* because the relevant Supreme Court decisions do not "directly h[o]ld otherwise" (*id.* at 11a) and because the recent decision of this Court in *Drye* v. *United States*, 528 U.S. 49 (1999), which was issued after *Craft I* was decided, "has not so fundamentally changed the legal landscape as to overrule *Craft I*." App., *infra*, 18a.

b. In a concurring opinion, Judge Gilman agreed that the panel was bound by *Craft I* but concluded "that the result reached in *Craft I*, and that this court endorses today, is inconsistent with Supreme Court precedent and should be reversed." App., *infra*, 35a. Judge Gilman therefore recommended "that this case be revisited en banc." *Ibid.*

Judge Gilman stated that the decision in *Craft I* was inconsistent with the decisions of this Court that make clear that the federal tax laws are "not struck blind" by state-law legal fictions. App., *infra*, 36a (quoting *United States* v. *Irvine*, 511 U.S. at 240). Judge Gilman stated that (App., *infra*, 38a):

> [i]n contravention of *Irvine*, the majority in *Craft I* failed to look past Michigan's characterization of an individual's interest in entireties property and

[4] On respondent's appeal, the panel affirmed the district court's ruling that the government is entitled to a lien on the property to the extent of taxpayer's payments of the principal of the outstanding mortgage loan. App., *infra*, 20a-23a.

> ignored the substantial rights actually held by Don Craft, which similarly had undeniable value. In other words, I believe that the majority in *Craft I* was "struck blind" by Michigan's "legal fictions."

Judge Gilman noted that each spouse has several valuable, legally-protected rights in entirety property to which the federal tax lien may attach: (i) the right to enter and enjoy the property and to exclude all others; (ii) the right to half of any rental or sale proceeds; (iii) a contingent right of survivorship; and (iv) in the event of divorce, the right to bring an action for partition and sale. App., *infra*, 37a-38a. Because these valuable rights are protected under state law, "*Craft I* reached the wrong result, and the IRS ought to have had the right to attach Don Craft's valuable interest in the tenancy by the entirety." *Id.* at 38a. Although Judge Gilman believed the panel was bound by *Craft I*, he recommended that the case be reheard *en banc* because "*Craft I* contravenes recent Supreme Court decisions." *Id.* at 41a.

c. Following the entry of the panel decision, the government filed a petition for rehearing *en banc*. That petition was denied when "less than a majority of the judges" of that circuit voted to grant it. App., *infra*, 43a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs from numerous recent decisions of this Court, including *Drye* v. *United States*, 528 U.S. 49 (1999), *United States* v. *Irvine*, 511 U.S. 224 (1994), *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), and *United States* v. *Rodgers*, 461 U.S. 677 (1983). It is also irreconcilable with older precedent of this Court, such as *Tyler* v. *United States*, 281 U.S. 497 (1930).

The question presented in this case has substantial, recurring importance. Tenancies by the entirety are recognized in 24 States, which have adopted widely varying rules regarding the rights of creditors in such property. See note 14, *infra*. Under the decision in this case, taxpayers in States that maintain the common law fiction that property held in a tenancy by the entirety is held by the "marital unit"—rather than by the individual spouses acting collectively—receive an exemption from enforcement of the federal tax lien that is not available in jurisdictions with a more modern jurisprudence. See note 15, *infra*. Similarly, a taxpayer who owns entirety property in States where creditors cannot attach such property for the debts of only one spouse is treated more favorably than a taxpayer who owns property in the States where creditors are permitted by state law to attach such property. See note 16, *infra*. The conflicting treatment that results under the erroneous decision of the court of appeals warrants review by this Court, for it is well established that the Nation's tax laws are to be interpreted and applied to "ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979). See pages 20-24, *infra*.

Further review is especially warranted because the decision in this case "not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws." App., *infra*, 70a (Ryan, J.). Significant opportunities for extraordinarily facile evasion of tax obligations exist under the decision in this case. Under the laws of many States, both real and personal property may be held in a tenancy by the entirety. See notes 17-18, *infra*. Under the decision in this case, not only residences but also bank accounts

and other financial assets may be purchased with untaxed income and then shielded from tax collection through the simple artifice of placing ownership in the "marital unit" through a tenancy by the entirety. It is difficult to conceive of a more simple or widely available method of tax evasion.[5]

The amount of revenue potentially affected by the rule adopted by the court of appeals is obviously enormous, for it provides a ready device for avoiding collection of the taxes owed by all married persons in the many states (such as Michigan) that maintain the common-law fiction that ownership of tenancy-by-the-entirety property resides solely with the "marital unit." Under the reasoning of the court of appeals, both spouses could earn income, file separate returns,[6] and

[5] This is illustrated by another pending Michigan case that involves a lawyer who filed tax returns for several years that reported extensive income from his law practice. Instead of paying these taxes, the lawyer used his untaxed income to accumulate equity in four valuable parcels of property that he placed in a tenancy by the entirety. The district court concluded that, under the decision in *Craft I*, the federal tax liens did not attach to these properties. The government has appealed that decision (*Hatchett* v. *IRS*, 126 F. Supp. 2d 1038 (E.D. Mich. 2000), appeal docketed, No. 00-1645 (6th Cir. June 13, 2000)), but the taxpayer's transparent scheme to avoid collection appears likely to succeed in the absence of review by this Court of the decision in this case.

[6] Married taxpayers become jointly and severally liable for taxes when they elect to file joint returns. See 26 U.S.C. 6013(d)(3). Since, if they file a joint return, both spouses are liable for the resulting taxes, property held in a tenancy by the entirety could then be seized for collection in states (such as Michigan) that allow such property to be seized to collect a debt owed by both spouses. See App., *infra*, 52a. The tax avoidance scheme sanctioned by the court of appeals in this case thus operates only when married taxpayers file no returns or file separate, rather than joint, returns. See note 7, *infra*.

avoid paying taxes by shielding their residence, bank accounts and other financial assets in a tenancy by the entirety.[7] Review by this Court of this recurring question is needed to prevent the "easy avoidance of federal income-tax laws" that is sanctioned by the decision below. App., *infra*, 70a (Ryan, J.).

1. When a taxpayer fails to pay taxes after a demand for payment has been made, a lien arises by operation of law "in favor of the United States upon all property and rights to property" of that taxpayer. 26 U.S.C. 6321. The question in this case is whether the interest of a married taxpayer in property held in a tenancy by the entirety is encompassed within the sweeping scope of this statutory lien. As this Court has emphasized on several occasions, "[t]he statutory language 'all property and rights to property' * * * is broad and reveals on its face that *Congress meant to reach every interest in property that a taxpayer might have.*" *United States* v. *National Bank of Commerce*, 472 U.S. at 719-720 (emphasis added). Indeed, "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945). Recognizing the sweeping text and purpose of the statute, this Court has recently held that this broad federal tax lien "reach[es] every species of right or interest protected

[7] The decision in this case provides obvious incentives for tax protestors (and others) to employ the tenancy-by-the-entirety device to obstruct collection of tax obligations. Indeed, taxpayers have not been shy about employing this tax avoidance method. The Internal Revenue Service informs us that, among Michigan taxpayers, while only 3% of married taxpayers who file jointly have unpaid taxes outstanding, approximately 14% of married taxpayers who file separately have unpaid taxes outstanding.

by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. at 56.

The interest of a married taxpayer in a tenancy by the entirety is a valuable, legally protected "species of right or interest" and is therefore encompassed within the federal tax lien.[8] During the period of a tenancy by the entirety, each spouse has separate rights in the present use of the property and in its disposition upon the termination of the tenancy by sale, death or divorce. For example, in Michigan, "joint property"—a category that includes a tenancy by the entirety in real or personal property—"consist[s] of a present interest and a future interest." Mich. Comp. Laws Ann. § 554.872(g), (i) (West Supp. 1997), recodified, *id.* § 700.2901(g), (i) (West Supp. 2001). The "present interest" entitles each spouse to reside on the property, to exclude third parties from the property, to share in the profits of the property, to join or refuse to join in a sale of property and, upon the sale, individually to receive half the proceeds. *Id.* § 557.71 (West 1988); see *Rogers* v. *Rogers*, 136 Mich. App. 125, 135, 356 N.W.2d 288, 293 (Mich. Ct. App. 1984). The "future interest"

[8] The fact that a federal tax lien has been imposed on entirety property does not, by itself, divest the "marital estate" from possession. The primary effect of a lien is to ensure that such property remains potentially available for payment of delinquent taxes and cannot be transferred free of the government's claim in the interim. Moreover, as this Court emphasized in *United States* v. *Rodgers*, 461 U.S. at 696, the government's lien reaches only the taxpayer's interest in property. If the government seeks to sell the property to enforce its lien under 26 U.S.C. 7403, the court may deny foreclosure in "the exercise of reasoned discretion." 461 U.S. at 706. And, if a sale is authorized, the non-liable spouse must be compensated for her interest "according to the findings of the court in respect to the interests of the parties and the United States." *Id.* at 697 (quoting 26 U.S.C. 7403(c)).

described in the statute "is the right of survivorship," which is the right to receive the property in fee simple absolute upon the death of the other spouse. Mich. Comp. Laws Ann. § 554.872(g) (West Supp. 1997), recodified *id.* § 700.2901(g) (West Supp. 2001). These valuable interests are expressly described as "property" rights under state law. *Id.* § 700.2901(i).

The Michigan Supreme Court has emphasized that each spouse holding a tenancy by the entirety has "a significant interest in property" that is protected by the Due Process Clause of the United States Constitution. *Dow* v. *State*, 396 Mich. 192, 204, 240 N.W.2d 450, 456 (Mich. 1976). As Judge Gilman stated in his separate opinion in the court of appeals, the panel majority in this case has thus "ignored the substantial rights actually held by Don Craft." App., *infra*, 38a. These legally-protected rights have "undeniable value" and thus constitute "property or rights to property" within the broad scope of the federal tax lien. *Ibid.*[9]

2. The court of appeals erred by relying (App., *infra*, 51a-53a) on its decision in *Cole* v. *Cardoza*, 441 F.2d 1337 (6th Cir. 1971), and in failing to follow the more recent, clear guidance of this Court in *Drye* v. *United States*, *supra*, *United States* v. *Irvine*, *supra*, and *United States* v. *Rodgers*, *supra*.

a. The rationale of *Cole* v. *Cardoza*, 441 F.2d at 1343, is that state law "governs the property rights of taxpayers" and that courts must therefore "look to the law of" the State in determining whether "the federal tax

[9] The valuable, legally-protected rights of a taxpayer in entirety property under Michigan law are not less extensive than the right of an heir-at-law to inherit under Arkansas law—a right to which the federal tax lien attached under this Court's decision in *Drye* v. *United States*, 528 U.S. at 59-60.

lien attach[es] to the * * * property." The court concluded that, since "tenants by the entirety hold under a single title" under Michigan law, the federal tax lien cannot attach to the property for the debts of one spouse only. *Ibid.* The court of appeals repeated the reasoning of *Cole* by relying on what it described as "the basic tenet that state law governs the issue * * * whether any property interests exist in the first place." App., *infra*, 46a.

That reasoning is demonstrably in error, however, for this Court has made it clear that "[i]t is not material that the economic benefit to which the [taxpayer's] right pertains is not characterized as 'property' by local law." *Drye* v. *United States*, 528 U.S. at 58 n.5 (quoting W. Plumb, *Federal Tax Liens* 27 (3d ed. 1972)). This Court has clearly held that, while state law determines the nature of a taxpayer's interest in property, federal law determines whether that interest is sufficient to constitute "property" or "rights to property" under 26 U.S.C. 6321. In *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (internal quotations omitted), the Court explained that:

> [o]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of the [statute], state law is inoperative, and the tax consequences thenceforth are dictated by federal law.

Courts are therefore to "look * * * to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye* v. *United States*, 528 U.S. at 58. See also *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958); *Morgan* v. *Commissioner*, 309 U.S. 78, 80 (1940). And, applying this

federal standard, this Court has clearly and concisely held that the tax lien attaches to "every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. at 56.

b. Each spouse in a tenancy by the entirety possesses valuable legally-protected rights that constitute "property or rights to property" to which the lien applies under this expansive federal standard. See pages 12-13, *supra*. Indeed, the court of appeals ultimately appeared to acknowledge in the present case that each spouse possesses valuable rights in a tenancy by the entirety that are protected under state law. The court reasoned, however, that the federal tax lien does not attach to these interests in property—such as the right of survivorship—because the rights of each spouse are not treated as "separate" or "severable" interests under state law. App., *infra*, 57a-58a.

That reasoning conflicts with the plain text of the tax lien statute and with the clear holdings of this Court. The federal tax lien attaches to "*all* property and rights to property" (26 U.S.C. 6321 (emphasis added)), not merely to property that is immediately transferable by the person who owns the interest. For example, in *United States* v. *Rodgers*, 461 U.S. at 684-685, which concerned a married taxpayer who held an interest in homestead property that could not be mortgaged, sold or abandoned without the consent of the other spouse under state law, the Court held that the inability of the taxpayer to exercise his rights separately from the rights of his spouse was not a basis for denying foreclosure of the federal tax lien. *Id.* at 702. See also *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173, 176 (6th Cir. 1996) (federal tax lien attaches to the interest of the beneficiary of a spendthrift trust) (cited in *Drye*

v. *United States*, 528 U.S. at 58 n.5 & 60 n.7); note 9, *supra*.

c. The court of appeals similarly ignored the precedents of this Court in relying on the fact that Michigan does not authorize the seizure of tenancy by the entirety property for the debts of only one spouse. App., *infra*, 52a (citing *Cole* v. *Cardoza*, 44 F.2d at 1343). This Court has frequently emphasized that state-law restrictions on seizure and exemptions from foreclosure do not operate to prevent the attachment and enforcement of the federal tax lien. See *Drye* v. *United States*, 528 U.S. at 59 (quoting *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971) ("exempt status under state law does not bind the federal collector")); Note, *Property Subject to the Federal Tax Lien*, 77 Harv. L. Rev. 1485, 1498 (1964) (stripped of its fiction that husband and wife are a legal unit, the entirety theory "serves much the same function as an exemption created by state law" and thus should not "defeat the federal lien"). As this Court explained in detail in *United States* v. *National Bank of Commerce*, 472 U.S. at 727:

> The question whether a state-law right constitutes "property" or "rights to property" is a matter of federal law. * * * [T]he facts that under [state] law [the taxpayer's] creditors * * * could not [seize or attach the property] are irrelevant. The federal statute relates to the taxpayer's rights to property and not to his creditors' rights.

Indeed, in *United States* v. *Rodgers*, 461 U.S. at 700, the Court expressly held that "state-created exemptions against forced sale" of jointly-owned property are ineffective against the federal lien.

d. The court of appeals plainly erred in relying on the legal fiction employed in Michigan that property held in a tenancy by the entirety is owned by the marital unit, rather than by the individual spouses acting collectively. App., *infra*, 51a-53a. The court reasoned that the consequence of this legal fiction is that neither spouse has an interest in "property" or a "right to property" to which the federal tax lien could attach. *Ibid.*

This Court has emphasized, however, that the federal tax lien statute is not "struck blind" by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59. In *Drye*, the Court applied that principle in holding that the federal tax lien attached to the interest of an heir who disclaimed his rights in an intestate estate even though state law deemed any such disclaimer to have occurred *before* the death of the decedent so that creditors would be unable to attach the disclaimant's interest in the estate. The Court held that the federal tax lien statute is "not struck blind" by the legal fictions of state law and that the right of the heir to inherit is "a valuable, transferable, legally protected right" to which the federal tax lien attached before the disclaimer was made. *Id.* at 59, 60. See also *United States* v. *Irvine*, 511 U.S. at 240 ("Congress had not meant to incorporate state-law fictions as touchstones of taxability when it enacted the Act.").

Indeed, in *Tyler* v. *United States*, 281 U.S. 497 (1930), this Court specifically rejected the proposition that federal tax law is "struck blind" by the state law fiction that entirety property is owned by the "marital unit" rather than by the spouses acting collectively. That case concerned the constitutionality of the Revenue Act of 1916, ch. 463, § 202(c), 39 Stat. 778, which taxed the total value of entirety property—both the share attrib-

utable to the decedent and to the surviving spouse—in the estate of the first spouse to die.[10] The estate administrators contended that the entirety property was owned by the marital unit under state law and that, on the death of the first spouse, the survivor merely retained what she already had. They argued that a transfer of property therefore did not occur on the date of death and that the estate tax, as applied to this situation, constituted an unconstitutional direct tax without apportionment. 281 U.S. at 500. The Court rejected this argument and explained in detail why the "amiable fiction of the common law [that] husband and wife are but one person" is not binding on federal tax legislation (*id.* at 503):

> According to the amiable fiction of the common law, * * * husband and wife are but one person * * *. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law.

Federal tax law thus looks to "the actual results" rather than merely to "the artificial rules" of state law in determining the nature and taxability of the rights possessed by tenants by the entirety. *Ibid.* In *Tyler*,

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[10] Section 2040(b) of the Internal Revenue Code currently includes only one-half of the value of such property in the decedent's gross estate. 26 U.S.C. 2040(b).

because the death of the first spouse resulted in an expansion of the survivor's "actual" property rights, the Court upheld the constitutionality of the estate tax on the entire value of the entirety property. 281 U.S. at 504.[11]

In *United States* v. *Rodgers*, 461 U.S. at 703 n.31, although the precise question at issue here was not presented, the Court stated that it was not convinced of the correctness of appellate decisions that, prior to that date, had concluded that the federal tax lien would not attach to a taxpayer's interest in a tenancy by the entirety.[12] Noting that these older cases had rested on "the peculiar legal fiction governing tenancies by the entirety in some States," the Court emphatically questioned "*if* the tenancy by the entirety cases are correct." *Ibid.* (emphasis in original). As one commentator has observed, the reasoning of the older cases that relied on the state legal fiction of the "marital unit" "was dubious before" and "[n]ow, after *Drye*, its incorrectness is glaringly clear." S. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to*

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[11] In explaining the reasoning of *Tyler* in *United States* v. *Jacobs*, 306 U.S. 363 (1939), the Court emphasized that "[t]he constitutionality of an exercise of the taxing power of Congress is not to be determined by such * * * ancient fictions" as the ownership of entirety property by the marital unit. *Id.* at 369.

[12] The cases cited by the Court in *Rodgers* are *United States* v. *American National Bank*, 255 F.2d 504, 507 (5th Cir.), cert. denied, 358 U.S. 835 (1958), and *United States* v. *Hutcherson*, 188 F.2d 326, 331 (8th Cir. 1951). The Eighth Circuit recently distinguished its decision in *Hutcherson* in *Cox* v. *Commissioner*, 121 F.3d 390, 392 (1997).

Tenancy-by-the-Entireties Interests, 75 Ind. L.J. 1163, 1189-1190 (2000).[13]

e. In his separate opinion below, Judge Gilman agreed with the government that the decision of the panel majority "contravenes recent Supreme Court decisions." App., *infra*, 41a. The panel majority stated, however, that the decisions of this Court concerning the relationship of federal and state law under the federal tax lien statute "have wavered over time" and that the most recent decisions (such as *Drye* and *Irvine*) have "not so fundamentally changed the legal landscape" as to require a different result in this case. *Id.* at 14a n.12, 18a. The court of appeals thus squarely refused to apply the recent and clear admonition of this Court in *Drye* that, notwithstanding state legal fictions, the federal tax lien statute reaches the realities of the taxpayer's "valuable" and "legally protected" interests in property. 528 U.S. at 58-59. In view of the court's refusal (at the suggestion of one of its members) to redress this conflict en banc, certiorari review is the only means now available for obtaining compliance with the "recent * * * decisions" of this Court. App., *infra*, 42a.

3. This Court has emphasized the importance in a national tax system of avoiding "inequalities in the administration of the revenue laws" and of ensuring that taxpayers do not receive "treatment different from that given to other taxpayers of the same class." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). See also *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. at 544. The decision of the court of appeals disserves that

[13] See also S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 871 (1995).

principle. The tenancy by the entirety is a form of property ownership that exists in 24 States, the Virgin Islands and the District of Columbia.[14] Of all the forms of joint property ownership, the tenancy by the entirety is the *only* form that has been treated as exempt from the federal tax lien. Every other type of jointly-owned property has consistently been held subject to the federal tax lien. See, *e.g.*, *United States* v. *Rodgers*, 461 U.S. at 690-691 (homestead property); *United States* v. *Davenport*, 106 F.3d 1333, 1337 (7th Cir. 1997) (joint tenancy); *United States* v. *Kocher*, 468 F.2d 503, 507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973) (tenancy in common); *United States* v. *Overman*, 424 F.2d 1142, 1145 (9th Cir. 1970) (community property); *Washington* v. *United States*, 402 F.2d 3, 7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971) (property subject to dower interest). Under the decision in this case, a taxpayer who owns property in a tenancy by the entirety is thus treated more favorably than a taxpayer who owns property in the 26 States that do not recognize, or have abolished, that form of ownership.[15]

[14] These States are Alaska, Arkansas, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Mississippi, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. See R. Heaton, *Administration of Entireties Property in Bankruptcy*, 60 Ind. L.J. 305, 309 n.24 (1985); 735 Ill. Comp. Stat. Ann. 5/12-112 (West 1993 & Supp. 2000). In addition, between 1972 and 1985, a tenancy by the entirety could be created in Ohio, and an entirety interest created during that period is still treated as valid. Ohio Rev. Code Ann. §§ 5302.17-5302.21 (Anderson 1989 & Supp. 2000); see *In re Cline*, 164 B.R. 592, 593-594 (Bankr. S.D. Ohio 1994).

[15] As part of the progressive recognition of women's property rights during the Nineteenth Century (under what were generally known as the Married Women's Property Acts), several western

There is no adequate basis in the text or the purpose of the federal tax lien statute for this difference in treatment. To the contrary, as this Court has stated, there is a "sufficient similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation." *United States* v. *Jacobs*, 306 U.S. 363, 370 (1939). In all other respects, these two forms of ownership have consistently received equal treatment under the revenue laws (*ibid.* (emphasis added)):

> A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person." *Only a fiction stands between the two.* Survivorship is the predominant and distinguishing feature of each.

Even within the group of States that recognize tenancies by the entirety, the decision in this case produces inconsistent treatment. Under the decision below, taxpayers who own entirety property in the States where creditors can attach such property for a debt owed by *one* spouse are treated less favorably than taxpayers who own such property in the States where creditors can attach such property only for a debt owed by *both* spouses.[16] See, *e.g.*, *Geiselman* v.

States never chose to adopt the tenancy by the entirety and several other states elected to abolish or restrict that form of ownership. S. Johnson, *supra*, 60 Mo. L. Rev. at 843. See, *e.g.*, *Kerner* v. *McDonald*, 60 Neb. 663, 84 N.W. 92 (1900). In England, where the tenancy by the entirety originated, that form of ownership was abolished in 1925. S. Johnson, *supra*, 60 Mo. L. Rev. at 843.

[16] Fourteen States (and the Virgin Islands and the District of Columbia) prohibit creditors from attaching entirety property for the debts of only one spouse: Delaware, Florida, Hawaii, Illinois,

United States, 961 F.2d 1, 7 (1st Cir.), cert. denied, 506 U.S. 891 (1992) (husband's interest in entirety property is subject to the federal tax lien because Massachusetts

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Indiana, Maryland, Michigan, Missouri, North Carolina, Pennsylvania, Rhode Island, Virginia, Vermont and Wyoming. See *Mitchell* v. *Wilmington Trust Co.*, 449 A.2d 1055, 1057-1058 (Del. Ch. 1982), aff'd, 461 A.2d 696 (Del. 1983); *Finley* v. *Thomas*, 691 A.2d 1163, 1166 (D.C. 1997); *Sitomer* v. *Orlan*, 660 So. 2d 1111, 1114 (Fla. Dist. Ct. App. 1995); *Sawada* v. *Endo*, 57 Haw. 608, 617, 561 P.2d 1291, 1297 (1977); 735 Ill. Comp. Stat. Ann. 5/12-112 (West 1993 & Supp. 2000); *Diss* v. *Agri Bus. Int'l, Inc.*, 670 N.E.2d 97, 99 (Ind. Ct. App. 1996); *State* v. *One 1984 Toyota Truck*, 311 Md. 171, 187, 533 A.2d 659, 667 (1987); *SNB Bank & Trust* v. *Kensey*, 145 Mich. App. 765, 775-777, 378 N.W.2d 594, 599 (1985); *In re Van Der Heide*, 164 F.3d 1183, 1184 (8th Cir. 1999) (Missouri law); *Dealer Supply Co.* v. *Greene*, 108 N.C. App. 31, 34, 422 S.E.2d 350, 352 (1992), review denied, 333 N.C. 343, 426 S.E.2d 704 (1993); *Koffman* v. *Smith*, 453 Pa. Super. 15, 27, 682 A.2d 1282, 1288 (1996); *Bloomfield* v. *Brown*, 67 R.I. 452, 25 A.2d 354 (1942); *Masonry Prods., Inc.* v. *Tees*, 280 F. Supp. 654, 657 (D.V.I. 1968); *Rogers* v. *Rogers*, 257 Va. 323, 326, 512 S.E.2d 821, 822 (1999); *Lowell* v. *Lowell*, 138 Vt. 514, 516, 419 A.2d 321, 322 (1980); *Colorado Nat'l Bank* v. *Miles*, 711 P.2d 390, 393-394 (Wyo. 1985). Nine of the States that recognize the tenancy by the entirety, however, permit creditors to attach one spouse's interest in such property for the debts of only that spouse, subject to the rights of the nondebtor spouse: Alaska, Arkansas, Kentucky, Massachusetts, New Jersey, New York, Oklahoma, Oregon, Rhode Island, and Tennessee. See Alaska Stat. § 09.38.100(a) (Michie 2001); *Morris* v. *Solesbee*, 48 Ark. App. 123, 128, 892 S.W.2d 281, 283 (1995); *Hoffman* v. *Newell*, 60 S.W.2d 607, 613 (Ky. 1932); *In re Snyder*, 231 B.R. 437, 442 (Bankr. D. Mass. 1999); *United States* v. *Jones*, 877 F. Supp. 907, 916-920 (D.N.J.), aff'd mem., 74 F.3d 1228 (3d Cir. 1995); *BNY Fin. Corp.* v. *Moran*, 154 Misc. 2d 435, 436, 584 N.Y.S.2d 261, 262 (Sup. Ct. 1992); Okla. Stat. Ann. tit. 60, § 74 (West 1994); *Wilde* v. *Mounts*, 95 Or. App. 522, 524-525, 769 P.2d 802, 803-804 (1989); *Arango* v. *Third Nat'l Bank*, 992 F.2d 611, 613 (6th Cir. 1993) (Tennessee law). The rule in Mississippi is uncertain. See *Cuevas* v. *Cuevas*, 191 So. 2d 843 (Miss. 1966).

law permits creditors to attach his interest in the property); *United States* v. *Diemer*, 859 F. Supp. 126, 131 (D.N.J. 1994), rev'd on other grounds *sub nom. United States* v. *Avila*, 88 F.3d 229 (3d Cir. 1996) (same under New Jersey law); *United States* v. *Brynes*, 848 F. Supp. 1096, 1099 (D.R.I. 1994) (same under Rhode Island law); *United States* v. *Ragsdale*, 206 F. Supp. 613 (W.D. Tenn. 1962) (same under Tennessee law).

The arbitrary inequality of treatment that results under the decision in this case is magnified by the fact that entirety ownership is not limited to real estate. At least fourteen States (and the District of Columbia) also allow personal property—such as automobiles, stocks, bonds and bank accounts—to be owned in a tenancy by the entirety.[17] Several other States allow some, but not

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[17] These jurisdictions are: Alaska, Arkansas, Delaware, the District of Columbia, Florida, Hawaii, Kentucky, Maryland, Massachusetts, Missouri, Oklahoma, Pennsylvania, Tennessee, Vermont, and Virginia. See *Faulk* v. *Estate of Haskins*, 714 P.2d 354 (Alaska 1986); *Boggs* v. *Boggs*, 26 Ark. App. 188, 190, 761 S.W.2d 956, 957 (1988); *Ciconte* v. *Barba*, 161 A. 925 (Del. Ch. 1932); *In re Estate of Wall*, 440 F.2d 215, 219 (D.C. Cir. 1971); *Beal Bank, SSB* v. *Almand & Assocs.*, 780 So. 2d 45, 53-54 (Fla. 2001); *Traders Travel Int'l, Inc.* v. *Howser*, 69 Haw. 609, 613, 753 P.2d 244, 246 (1988); Ky. Rev. Stat. Ann. § 140.050 (Michie 1991); *State* v. *One 1984 Toyota Truck*, 69 Md. App. 235, 237-238, 517 A.2d 103, 104 (1986), aff'd, 311 Md. 171, 533 A.2d 659 (1987); *Woodard* v. *Woodard*, 216 Mass. 1, 2, 102 N.E. 921, 922 (1913); *Hallmark* v. *Stillings*, 648 S.W.2d 230, 233 (Mo. Ct. App. 1983); Okla. Stat. Ann. tit. 60, § 74 (West 1994); *Madden* v. *Gosztonyi Sav. & Tr. Co.*, 331 Pa. 476, 483, 200 A. 624, 628 (1938); *White* v. *Watson*, 571 S.W.2d 493, 495 (Tenn. Ct. App. 1978); *Beacon Milling Co.* v. *Larose*, 138 Vt. 457, 461, 418 A.2d 32, 33 (1980); *Oliver* v. *Givens*, 204 Va. 123, 126, 129 S.E.2d 661, 663 (1963).

all, types of personal property to be owned in a tenancy by the entirety.[18]

4. The decision in this case not only produces inconsistent treatment of similarly situated taxpayers, it also provides significant opportunities for obstructing and avoiding the collection of taxes. For example, under the reasoning of the decision below, both spouses may earn income, fail to file returns or file only separate returns (see note 6, *supra*), place their assets—such as real property, stocks, bonds and bank accounts—in a tenancy by the entirety, and claim an exemption of that property from tax collection. They could then use that "exempt" property to earn income or to pay other debts. As Judge Ryan emphasized in his separate opinion in this case, the majority opinion "not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws." App., *infra*, 70a. This decision has, in short, "left us with a rule which compromises the revenue, creates a ready pathway for tax avoidance, defeats equal treatment of taxpayers, and lacks any defensible doctrinal underpinning." S. Johnson, *supra*, 60 Mo. L. Rev. at 888.

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[18] For example, Michigan allows bonds, stocks, mortgages, promissory notes, debentures, and other financial assets to be held in a tenancy by the entirety. *DeYoung* v. *Mesler*, 373 Mich. 499, 505, 130 N.W.2d 38, 41 (1964) (dissenting opinion). In Michigan and Indiana, personalty derived from real estate (such as crops) and the proceeds of the sale of real estate may be owned in tenancy by the entirety when the underlying real estate was itself held in that form of ownership. See *ibid.*; *Koehring* v. *Bowman*, 194 Ind. 433, 142 N.E. 117, 118 (1924).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2001

Supreme Court, U.S.
FILED

001831 JUN - 8 2001

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONERS

v.

SANDRA L. CRAFT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-1734, 99-1737

SANDRA L. CRAFT, PLAINTIFF-APPELLEE/
CROSS-APPELLANT

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE
COMMISSIONER OF INTERNAL REVENUE,
DEFENDANT-APPELLANT/CROSS-APPELLEE

Appeal from the United States District Court for the
Western District of Michigan at Grand Rapids
No. 93-00306-Gordon J. Quist, District Judge

Argued: August 10, 2000

Decided and Filed: November 22, 2000

Before: KEITH, COLE, and GILMAN, Circuit Judges

OPINION

COLE, Circuit Judge.

This case is before us for the second time. In *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998) (hereinafter, "*Craft I*"), we held that a federal tax lien against Plaintiff-Appellee Sandra L. Craft's now-deceased hus-

band, Don, did not attach to property held by the couple in a "tenancy by the entirety" under Michigan law. On remand, the district court found that Defendant-Appellant the United States of America ("IRS," or "the government") was nonetheless entitled to $6,693 with which Don had fraudulently enhanced the entireties property. Now, the IRS appeals the district court's judgment on the basis that the *Craft I* panel misconstrued the law. Sandra responds that the IRS is precluded from raising this argument on appeal by the "law of the case" doctrine and other principles. Sandra also raises a number of claims in a cross-appeal. For the following reasons, we **DISMISS** the IRS's effort to overturn *Craft I* as precluded by both the law of the case doctrine and the rule that one panel of this court may not overrule the prior decision of another panel. We **AFFIRM** the decision of the district court regarding Sandra's claims.

I. BACKGROUND

The essential facts of the case are as follows.[1] In May 1972, Sandra Craft and her husband, Don, purchased real property (known as the "Berwyck Property," for the road on which it was located) in Michigan as tenants by the entirety. *Craft I*, 140 F.3d at 639. Don failed to file federal income tax returns for tax years 1979 through 1986, and, in July 1988, the IRS assessed $482,446.73 against him in unpaid tax liabilities. *Id.* Don failed to pay his tax debts, and the IRS filed a notice of federal tax lien in March 1989 against all of Don's property and rights to property. *Id.*; *see also*

[1] *Craft I* contains a detailed factual and procedural background of this case. *See* 140 F.3d at 639-41.

I.R.C. § 6321. Don was insolvent during the period from April 1980 through August 1989.

On August 28, 1989, Don and Sandra transferred the Berwyck Property to Sandra by way of a quitclaim deed, in exchange for one dollar. *Craft I*, 140 F.3d at 639. In June 1992, Sandra sold the property to a third party for $119,888.20. *Id.* at 640. Pursuant to an agreement between Sandra and the IRS, Sandra kept half of the proceeds ($59,944.10); the other half was placed in a non-interest-bearing escrow account, subject to the same right, title, and interest that the federal tax lien had on the property. *Id.* In April 1993, Sandra filed a complaint pursuant to 28 U.S.C. § 2410(a), seeking to quiet title to the proceeds in the escrow account. *Id.* In its answer, the government argued that it was entitled to half of the proceeds from Sandra's sale of the property because its lien attached to Don's interest in the Berwyck Property, even though Don and Sandra had held the property as tenants by the entirety. *Id.* The government also claimed that Don had fraudulently conveyed his interest in the property to Sandra. *Id.*

Both parties moved for summary judgment in September 1993. The district court denied Sandra's motion and granted the government's motion in September 1994. *See id.* at 640. The district court held that at the time of the August 1989 conveyance, Don and Sandra's entireties estate terminated and each spouse took an equal half interest in the estate. *Id.* Accordingly, the district court held that the federal tax lien attached to Don's interest at that time. *Id.* Upon Sandra's motion, the court conducted further proceedings to determine the value of Don's interest at the time of the termination of the tenancy by the entirety.

See id. After a telephonic hearing, the court found in October 1996 that the value of Don's property to which the IRS lien attached was $50,293.94.[2] *See id.* at 641. The court then ordered that the IRS receive that amount from the escrowed proceeds. *Id.*

On cross-appeals to this court, the *Craft I* panel reversed the district court's ruling, holding that "[b]ecause Michigan law does not recognize one spouse's separate interest in an entireties estate, a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate." 140 F.3d at 643. The panel also held that, under Michigan law, "Don did not possess a separate future interest in the Berwyck Property; therefore, the federal tax lien could not attach to a future interest that did not exist under Michigan law." *Id.* at 644. After finding that Don had no present or future interest in the disputed property, the court remanded the case for determination of "whether a fraudulent conveyance occurred in this case." *Id.* at 644. Judge Ryan concurred in the majority's result, but argued that Don had a separate, future interest in the entireties property to which the tax lien might attach if the August 1989 transfer to Sandra were set aside as fraudulent. *See id.* at 649.

On remand, the district court conducted a bench trial. In written findings of fact and conclusions of law made in March 1999, the district court concluded that, although the transfer of the Berwyck Property to Sandra by quitclaim deed did not constitute a typical fraudu-

[2] The court reached the figure by dividing in half the difference between the fair market value of the property as of the date of the August 1989 transfer ($120,000) and the amount of the outstanding mortgage balance at the time ($19,412.12). *See Craft I*, 140 F.3d at 641.

lent conveyance under Michigan law, the government was entitled to relief under an exception to that law, *see McCaslin v. Schouten*, 294 Mich. 180, 292 N.W. 696, 699 (1940). The court found that under the exception, a creditor may obtain relief "where the debtor, while insolvent, places non-exempt funds beyond the reach of his creditors by enhancing the entireties property." *See id.* The court reasoned that from 1980 through 1985, while he was insolvent, Don and Sandra had used Don's funds to enhance the property by making a total of $6,693 in mortgage payments (excluding interest) on its behalf. The court found that Don's actions constituted a type of fraudulent conveyance under Michigan law, and that the government was entitled to recover the value of the mortgage payments ($6,693) plus interest (from the date of the court's October 1995 judgment) from the escrowed sales proceeds.[3] Sandra filed a motion to amend the judgment, arguing that the court should reverse its award of interest on the $6,693 it awarded to the IRS. Sandra also moved the court to award *her* interest, pursuant to 28 U.S.C. § 2411, on the funds that the IRS would have to return to her.[4] The court granted Sandra's motion in part, deleting the interest awarded to the IRS, but denied her request for interest.

The government filed a timely notice of appeal and Sandra filed a timely notice of cross-appeal in June

[3] The district court also rejected Sandra's theories to bar the government's relief. Sandra raises many of these theories on appeal, and we discuss them *infra*.

[4] The IRS was in possession of $50,293.94 of escrowed funds that the district court had awarded it in October 1995. Sandra was seeking interest on the $43,600.94 that the IRS would be returning to her (*i.e.*, 50,293.94 less $6,693).

1999. In October 1999, the government petitioned this court for en banc review of the *Craft I* decision. The government argued that the *Craft I* decision—as well *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971) (holding that federal government may not, under Michigan law, attach lien to entireties property to satisfy individual tax liability of one spouse), a prior decision upon which the *Craft I* court relied—conflicted with established, controlling precedent. This court rejected the petition in December 1999.

II. THE GOVERNMENT'S APPEAL

At this juncture, this case is not really about federal tax liens. Nor is it about state law property rights. This case is about the extent to which a prior decision of this court binds a subsequent panel when neither the facts, the parties, nor the law has changed. On appeal, the IRS reasserts its argument that a § 6321 federal tax lien against an individual taxpayer attaches to a tenancy by the entirety that the taxpayer shares, pursuant to Michigan law, with his spouse. This is, of course, the very argument we rejected in *Craft I*. For the reasons that follow, the government is precluded from re-arguing its case at this time.

A. Law of the Case

Under the law of the case doctrine, a court ought not reopen issues decided at an earlier point in the same litigation. *See Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997). "Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case." *Hanover Ins. Co. v. American Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (citation and quotation marks omitted). Although the doctrine of law

of the case is "not an inexorable command," and courts must use "common sense" in applying it, *see id.*, the power of this court to reach a result inconsistent with a prior decision reached in the same case is "to be exercised very sparingly, and only under extraordinary conditions." *General Am. Life Ins. Co. v. Anderson*, 156 F.2d 615, 619 (6th Cir. 1946) (citation and quotation marks omitted). We have delineated three such extraordinary conditions in which we will reconsider a prior ruling in the same case: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Hanover Ins. Co.*, 105 F.3d at 312. For the reasons that follow, the IRS fails to articulate the "extraordinary conditions" necessary for us to rehear the claims we have already rejected.

1. Clearly Erroneous and Manifest Injustice

The IRS looks first to the third exception, arguing that this court can revisit the issues decided by the *Craft I* panel because that panel's decision was clearly erroneous and would work a manifest injustice.[5] The government's argument is not persuasive because *Craft I* was not clearly erroneous.

The *Craft I* panel had before it circuit precedent that squarely addressed the issue before the court. In *Cole*,

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[5] The IRS points to *General Am. Life Ins. Co.* as an example of a case in which this court reconsidered its prior holding at a later stage in the same case. *See* 156 F.2d at 618-21. We do not dispute that we have the power to reach a result different from one reached earlier in the litigation; the government, however, has not met its burden in the instant case of showing the "extraordinary conditions" that will permit us to do so. *See id.* at 619.

this court held that a federal tax lien against a taxpayer did not attach to property owned by the taxpayer and his wife in a tenancy by the entirety. *See* 441 F.2d at 1343. Neither this court nor the Supreme Court has ever expressly overruled *Cole*. Nonetheless, the IRS contends that *Cole* has been effectively overruled by Supreme Court decisions subsequent to it. But no Supreme Court case has directly addressed the question before both the *Cole* and *Craft I* courts.[6] It is true that the Court has addressed the power of a federal tax lien to attach to state law property constructs other than a tenancy by the entirety, but the Court has done so only on narrow grounds. For instance, in *United States v. National Bank of Commerce*, 472 U.S. 713, 105 S. Ct. 2919, 86 L.Ed.2d 565 (1985), the Court held that the IRS had a right to levy upon a joint bank account for delinquent federal income taxes owed by only one of the owners of the account. *See id.* at 715, 724, 105 S. Ct. 2919. After discussing the specific characteristics of the taxpayer's rights under state law and under his contract with the bank, *see id.* at 723-24, 105 S. Ct. 2919, the Court was crystal clear about the specificity of its holding:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under § 6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint

[6] All of the cases to which the IRS cites for its contention that *Cole* has been overruled were before the *Craft I* panel save *Drye v. United States*, 528 U. S. 49, 120 S. Ct. 474, 145 L.Ed.2d 466 (1999), which we discuss *infra*.

> ownership. This case concerns the right to levy only upon joint bank accounts.

Id. at 726 n. 10, 105 S. Ct. 2919.[7] Likewise, in *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132, 76 L.Ed.2d 236 (1983), the Court held that I.R.C. § 7403 permits a district court to order the sale of a delinquent taxpayer's home, despite the fact that his wife, with whom he owned the home pursuant to a state homestead law, did not owe any of the indebtedness. *See id.* at 680, 103 S. Ct. 2132. As the *Craft I* panel noted, however, the *Rodgers* Court "recognized that tenancies by the entirety posed a problem distinct from that of homestead estates, in that neither spouse owns an independent interest in an entireties property while both spouses own independent interests in a homestead estate." 140 F.3d at 643 (citing *Rodgers*, 461 U.S. at 702-03 n. 31, 103 S. Ct. 2132). Thus, as the *Craft I* panel was presented with no binding precedent that overruled *Cole*, we cannot say that its decision was clearly erroneous.[8]

[7] Indeed, the Third Circuit has stated that, "in *National Bank of Commerce* the Supreme Court acknowledged that if money is held by a husband and wife in a joint bank account as *tenants by the entireties* under applicable state law 'the Government could not use the money in the account to satisfy the tax obligations of one spouse.'" *Internal Revenue Serv. v. Gaster*, 42 F.3d 787, 791 (3d Cir. 1994) (citing *National Bank of Commerce*, 472 U. S. at 729 n. 11, 105 S. Ct. 2919) (internal footnote omitted; emphasis added).

[8] Nor do *Cole* and *Craft I* stand alone. As the *Craft I* panel noted, this court reiterated the rule of *Cole* in subsequent cases. *See* 140 F.3d at 642 (citing *United States v. Certain Real Property Located at 2525 Leroy Lane* ("*Leroy Lane I*"), 910 F.2d 343, 351 (6th Cir. 1990)); *id.* (citing *United States v. Certain Real Property Located at 2525 Leroy Lane* ("*Leroy Lane II*"), 972 F.2d 136, 138 (6th Cir. 1992)); *see also Gaster*, 42 F.3d at 791 n. 3, 793 (holding

In finding that our decision in *Craft I* was not clearly erroneous, we acknowledge that there are colorable arguments on both sides of the question whether a federal tax lien against a taxpayer's "property" or "rights to property," *see* I.R.C. § 6321, attaches to a tenancy by the entirety. Indeed, Judge Ryan's concurrence in *Craft I* illustrates this point, *see* 140 F.3d at 645-49 (Ryan, J., concurring) (arguing that, if transfer of property to Sandra Craft were to be set aside, federal tax lien would attach to Don Craft's "future interest" in Berwyck property), as does Judge Gilman's separate concurrence in the instant appeal. We further recognize that this court has held that federal law supersedes state property law in other circumstances. *See, e.g., Bank One Ohio Trust Co., N.A. v. United States*, 80 F.3d 173, 176 (6th Cir. 1996) (finding that restraint on alienation created by state law does not prevent federal lien from attaching to spendthrift trust under § 6321); *Liberty State Bank and Trust v. Grosslight (In re Grosslight)*, 757 F.2d 773, 775 (6th Cir. 1985) (finding that property held as tenancy by the entirety is part of bankruptcy estate). But the fact that colorable arguments exist on both sides of a particular issue does not imply that the *Craft I* panel's decision is "clearly erroneous." There are colorable arguments in virtually every case we hear. To hold that their existence in the present case permits us to reopen an issue we have already settled in this very case would destroy the concept of finality in our courts, negate the predictability our legal system provides to people in the conduct of their affairs, and risk the unjust results that

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that IRS may not levy against bank account of delinquent taxpayer held in tenancy by the entirety where taxpayer did not have unilateral right to withdraw funds).

would surely follow were litigants to "panel-shop" and pursue, willy-nilly, two or more bites at the apple of settled law.

The *Craft I* panel was bound by circuit precedent that was directly on point in reaching the conclusion it reached.[9] It was faced with no Supreme Court precedent that directly held otherwise, and this court has reiterated the holding relied upon by the *Craft I* panel on more than one occasion. Further, other courts have reached results consistent with that reached by the *Craft I* panel. For these reasons, we reject the IRS's argument that the decision reached by the *Craft I* panel was "clearly erroneous."[10]

2. Subsequent Contrary View of the Law

The IRS also argues that the law of the case doctrine does not apply here because the Supreme Court's recent decision in *Drye v. United States*, 528 U.S. 49, 120 S. Ct. 474, 145 L.Ed.2d 466 (1999), decided after *Craft I*, states a view of the law that is contrary to that expressed in *Craft I*. *See Hanover Ins. Co.*, 105 F.3d at 312. In *Drye*, the Court held that a taxpayer could not

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[9] As the concurrence acknowledges, the law-of-the-circuit doctrine prohibits a subsequent panel of this court from revisiting an earlier panel's decision when there has not been a change in the substantive law or an intervening Supreme Court decision. Inasmuch as the rule of *Cole v. Cardoza* remained good law, the *Craft I* panel was bound to follow it.

[10] Because the third exception to the law of the case doctrine requires a finding that a prior decision was both clearly erroneous *and* that it would work a manifest injustice, *see Hanover Ins. Co.*, 105 F.3d at 312, our holding that *Craft I* is not clearly erroneous makes it unnecessary for us to address the question of whether that decision will work a manifest injustice.

defeat a federal tax lien by disclaiming, pursuant to state law, his interest in his mother's estate. 120 S. Ct. at 478. The IRS argues that *Craft I* conflicts with the *Drye* Court's statements that: 1) federal law determines whether a right or interest created under state law constitutes "property" or "rights to property" for purposes of the federal tax lien statute, *see Drye*, 120 S. Ct. at 481; and 2) state law legal fictions do not bind the federal government for purposes of the federal tax lien statute, *see Drye*, 120 S. Ct. at 482. At oral argument, the IRS added that *Drye* stands for the "new" legal rule that a federal tax lien attaches to a taxpayer's right to inherit property. Upon careful review, we find that *Craft I* is essentially consistent with the *Drye* Court's reasoning.

a.

In *Drye*, the taxpayer (Drye) was insolvent, and the IRS had obtained valid tax liens against all of his "property and rights to property" pursuant to I.R.C. § 6321.[11] *Id.* at 479. Drye's mother died, and Drye was sole heir to her $233,000 estate. *Id.* at 478. Drye "disclaimed" all his interests in his mother's estate pursuant to state law; as a result, the estate passed to Drye's daughter. *Id.* at 479. Drye's daughter established a spendthrift trust with the proceeds of her grandmother's estate, naming as beneficiaries herself,

[11] I.R.C. § 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Drye, and her mother. *Id.* Although applicable state law provided that the assets of a spendthrift trust were shielded from creditors seeking to satisfy debts of the trust's beneficiaries, *see id.*, the Court held that Drye's disclaimer did not defeat the government's tax liens. *Id.* at 478. The Court summarized the relationship between § 6321 and state law as follows:

> The Internal Revenue Code's prescriptions are most sensibly read to look to state law for delineation of the taxpayer's rights or interests, but to leave to federal law the determination whether those rights or interests constitute "property" or "rights to property" within the meaning of § 6321. "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the federal tax lien provision], state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States."

Id. at 478 (quoting *United States v. Bess*, 357 U.S. 51, 56-57, 78 S. Ct. 1054, 2 L.Ed.2d 1135 (1958) (brackets in original)). Under the approach taken in *Drye*, "We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of federal tax lien legislation." *Id.* at 481.

The IRS argues that the *Craft I* panel failed to apply this rule and relied instead on Michigan law to determine whether a taxpayer's involvement in a tenancy by the entirety constitutes property for the purposes of § 6321. We are not persuaded. First, we note that the

Supreme Court had stated prior to *Drye* the rule that a court must look to federal law to determine whether something constitutes "property" or "rights to property" for purposes of § 6321. *See, e.g., United States v. Irvine*, 511 U.S. 224, 238, 114 S. Ct. 1473, 128 L.Ed.2d 168 (1994) (noting the "general and longstanding rule in federal tax cases that although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed"); *National Bank of Commerce*, 472 U.S. at 727, 105 S. Ct. 2919 (stating that, "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law" for purposes of federal tax collection)[12]. The *Craft I* court was aware of that

[12] This precise nature of this rule appears to have wavered over time. *Compare Aquilino v. United States*, 363 U. S. 509, 514, 80 S. Ct. 1277, 4 L.Ed.2d 1365 (1960) (discussing the "application of state law in ascertaining the taxpayer's property rights" in determining whether property is subject to federal tax lien) *with National Bank of Commerce*, 472 U. S. at 727, 105 S. Ct. 2919. Regardless of which formulation of the rule is adopted, the key point is that the federal question—*i.e.*, whether a state-law right constitutes "property" or "rights to property" under the statute—cannot be considered independently from the state-law question— *i.e.*, what is the nature and extent of the state-law right. When, as in this case, state law provides that there can be no individual interest in property held in a tenancy by the entireties, there is nothing which can be deemed "property" or "rights to property" under federal law. This understanding of § 6321 does not reflect a failure on the part of the *Craft I* majority to put substance over form, as the concurrence charges, but rather comports with the long-established principle that "federal law creates no property rights but merely attaches consequences . . . to rights created under state law." *Bess*, 357 U. S. at 55, 78 S. Ct. 1054 (1958).

rule, *see* 140 F.3d at 641, and, more important, applied it properly.[13]

The *Craft I* court's analysis is consistent with the two-step analysis described in *Drye*. *See* 120 S. Ct. at 481. The *Craft I* court first looked to Michigan law and found that: 1) Michigan law holds that an individual spouse possesses no separate interest in entireties property, *Craft I*, 140 F.3d at 643, and 2) Michigan law holds that an individual spouse possesses no future interest in entireties property, *see id.* at 644.[14] Thus,

[13] The IRS attacks the court's statement that, "state law governs the issue of whether any property interests exist in the first place," *Craft I*, 140 F.3d at 643 (citing *Rodgers*, 461 U. S. at 683, 103 S. Ct. 2132), as being inconsistent with *Drye*. As did the Supreme Court in *Drye*, we note that, upon careful review, some of the language we used in *Craft I* was not "phrased so meticulously" as we would have liked. *See Drye*, 120 S. Ct. at 481. We do not, however, read the sentence of which the IRS complains nor the approach taken in *Craft I* to be inconsistent with the analytic approach taken by the *Drye* Court: that state law determines the rights a taxpayer has in property and federal law determines whether those rights constitute "property" or "rights to property" pursuant to § 6321. *See Drye*, 120 S. Ct. at 481.

[14] In his separate concurrence, Judge Gilman cites to *Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 293 (1984), to support the proposition that Don Craft possessed a contingent future interest in the Berwyck Property. Although the *Rogers* court did acknowledge that each spouse "is entitled to the enjoyment of the entirety and to survivorship," it emphasized that "neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other." *Rogers* is thus consistent with Michigan Supreme Court's refusal to recognize a severable future interest held by one spouse in an entireties property. *See Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880, 881 (1918). Moreover, to the extent that *Rogers* can be construed as being inconsistent with

under Michigan law, Don had no individual interest in the entireties property; and, because state law delineated no individual interest or right held by Don, there was nothing for federal tax law to deem to be "property" or "rights to property" for purposes of I.R.C. § 6321. Accordingly, *Craft I* is fundamentally consistent with *Drye*. *See Rodgers*, 461 U.S. at 702-03 n. 31, 103 S. Ct. 2132 (stating that cases which have found that a federal tax lien does not attach to a tenancy by the entirety "because neither spouse possessed an independent interest in the property . . . do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place.") (citing *United States v. American Nat'l Bank of Jacksonville*, 255 F.2d 504, 506 (5th Cir. 1958); *United States v. Hutcherson*, 188 F.2d 326, 331 (8th Cir. 1951)); *see also* 14 Mertens Law of Fed. Income Tax'n § 54A:13 (Supp. 2000) (citing *Craft I* for proposition that, although federal law determines whether a lien will attach to property interests held by delinquent taxpayer, "whether and to what extent a taxpayer has 'property' or 'rights to property' are [sic] determined under the applicable state law." (footnote omitted)).

b.

The IRS also argues *Craft I* is inconsistent with the *Drye* Court's refusal to subjugate federal tax law to state law legal fictions. *See Drye*, 120 S. Ct. at 482 (stating that "federal tax law 'is not struck blind by a disclaimer' " (quoting *Irvine*, 511 U.S. at 240, 114 S. Ct.

Sanford (which we believe it cannot), *Sanford* remains good law and is thus the controlling rule of decision.

1473)). But this proposition, too, had been established prior to *Craft I*, and the *Craft I* court was well aware of it. *See Craft I*, 140 F.3d at 643 (discussing *Irvine*, 511 U.S. at 240). Indeed, the *Craft I* court rejected the IRS's argument that it was being duped by a state law legal fiction. *See id.* We again reject the IRS's argument and find that the aspect of *Drye* reiterating the admonition regarding state law fictions is not a subsequent contrary view of the law. *See Hanover Ins. Co.*, 105 F.3d at 312; *Craft I*, 140 F.3d at 643.

c.

We are not at all persuaded by the IRS's last-minute characterization of *Drye* as standing for the proposition that a right to inherit property is subject to a federal tax lien. Because Don Craft had a conditional right to take the Berwyck property by survivorship pursuant to Michigan law (*i.e.*, should Susan predecease him), the argument goes, *see Craft I*, 140 F.3d at 642 (citing *Leroy Lane I*, 910 F.2d at 347), he comes under this purportedly "new" rule. This rendering of *Drye* is patently overbroad. If the Supreme Court intended to hold that every conceivable interest in property, no matter how remote, is subject to a federal tax lien, we have little doubt that it would have said so outright. We do not think it so held. Indeed, the *Drye* Court specifically stated (demonstrating that "analogy is somewhat hazardous in this area," *see Rodgers*, 461 U.S. at 685-86, 103 S. Ct. 2132) that a mere expectancy is not sufficient to constitute "property" or "rights to property" pursuant to § 6321: "Nor do we mean to suggest that an expectancy that has pecuniary value and is transferable under state law would fall within § 6321 prior to the

time it ripens into a present estate." [15] 120 S. Ct. at 482-83 n. 7; *see also United States* v. *Murray*, 217 F.3d 59, 63 (1st Cir. 2000) (stating that, pursuant to *Drye*, § 6321 is to be construed broadly, "but there are limits that reflect both common usage and policy. For example, the lien would likely not attach to land owned by a still-living relative of [the taxpayer], or to [his] expected inheritance of it, even if the relative had provided in his will that the land would go to [the taxpayer] on the relative's death."). [16] Thus, we reject the government's argument that *Drye* stands for the proposition that a federal tax lien attaches to any right to inherit property, no matter how remote. [17]

d.

In sum, *Drye* has not so fundamentally changed the legal landscape as to overrule *Craft I*. *See Blachy v. Butcher*, 221 F.3d 896, 907 (6th Cir. 2000) (Gilman, J.) (post-*Drye* decision distinguishing holding of *Craft I* from question of how to treat entireties property in bankruptcy case); *United States v. Green*, 201 F.3d 251, 253 (3d Cir. 2000) (citing *Drye*, 120 S. Ct. at 478, and indicating that federal tax lien does not attach to property held as tenancy by entirety pursuant to Pennsylvania law); *see also* Edward Kessel and Steven R. Klammer, *Supreme Court Finds Disclaimer Ineffective to Avoid Federal Tax Lien*, 92 J. Tax'n 118, 122 (2000) (discussing impact of *Drye* and suggesting that, even after decision, federal tax lien law may not apply to dower, curtesy, or elective share rights). Accordingly, the IRS's argument on appeal is precluded by the law of the case doctrine.

[15] In the instant case, Don Craft's expectancy of inheritance never ripened into a present estate. Indeed, Don predeceased Sandra.

[16] This is significant because the only interest which any member of the *Craft I* panel concluded might be subject to a federal tax lien was a future interest. *Compare* 140 F.3d at 644 *with id.* at 646 (Ryan, J., concurring).

[17] The concurrence criticizes the court for "going too far" in characterizing the IRS's argument in these terms. However, IRS counsel expressly endorsed this reading of the *Drye* decision during oral argument.

B. Law of the Circuit

Our decisions in *Craft I* and in *Cole* are also law of the circuit. As we recently stated, "One panel of this court may not overturn the decision of another panel of this court—that may only be accomplished through an en banc consideration of the argument." *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933, 945 (6th Cir. 2000). As discussed, *supra*, *Craft I* is not clearly erroneous, and it has not been called into doubt by any decision of the Supreme Court. [18] Because this panel may not conduct a plenary review of the result reached by a

[18] In his concurrence, Judge Gilman twice "recommend[s] that this case be revisited en banc." There is a clearly delineated procedure under the Federal Rules for a party to seek review of a matter en banc. *See* Fed. R. App. P. 35(b). The government is obviously aware of this procedure in that it previously filed a petition for en banc review of *Craft I*, although its petition did not garner a single vote. Moreover, this court's published Internal Operating Procedures provide that any active judge of this court may request, *sua sponte*, a request for a poll for rehearing on [*sic*] banc, even in the absence of a petition from a party. *See* 6 Cir. I.O.P. 35(c). We think it appropriate to reserve any discussion of whether this case should be reheard en banc as a part of the process contemplated by the aforementioned rules.

prior panel, the decision reached by the *Craft I* must stand.[19]

III. SANDRA'S CROSS-APPEAL

In her cross-appeal, Sandra first argues that the IRS was precluded from arguing on remand the fraudulent enhancement theory upon which it ultimately won relief. Next, Sandra argues that the governing statute of limitations barred the IRS's recovery under its fraudulent enhancement theory. Third, she claims that the IRS's remedy became moot upon Don's death. Finally, Sandra asserts that the IRS owes her interest on the funds to which she became entitled pursuant to our opinion in *Craft I*. Sandra has also submitted to this court a motion for costs under both Fed. R. App. P. 38 and the Equal Access to Justice Act, 28 U.S.C. § 2412. For the reasons that follow, we **AFFIRM** the judgment of the district court and **DENY** Sandra's motion for costs.

A.

Upon remand, the IRS argued two theories of recovery before the district court: first, that the August 1989 transfer from Don and Sandra to Sandra was a fraudulent *conveyance* pursuant to Michigan law, *see* Mich. Comp. Laws §§ 566.11-.23; and second, in the alternative, that Don's payment of mortgage and property tax obligations[20] from 1979 to 1985 on behalf of the

[19] All of the IRS's arguments on appeal require us to reject the holding of *Craft I*. Since we are unable to do that for the reasons discussed above, we **DISMISS** the government's appeal.

[20] On appeal, the government argues only that the mortgage payments—and not the property tax payments—constituted a fraudulent enhancement of the property.

entireties property constituted a voidable, fraudulent *enhancement* of the property. Sandra objected to the fraudulent enhancement theory (she contends that she did do early and often, *see infra*) on the grounds that the IRS had not raised the theory until immediately prior to trial, and that the theory went beyond the scope of this court's remand. The district court rejected Sandra's objection, and found that although the IRS had not raised specifically the fraudulent enhancement issue in its answer to Sandra's complaint,[21] the issue was tried by the implied consent of the parties, pursuant to Fed. R. Civ. P. 15(b).

In her cross-appeal, Sandra argues that the district court erred by permitting the IRS to argue on remand its new theory of fraudulent enhancement. First, Sandra asserts that the fraudulent enhancement issue went beyond the scope of this court's remand. Second, Sandra claims that she did not consent to trial of the new theory, but rather "objected repeatedly, vehemently and at every possible opportunity to the IRS raising a new issue for the first time on remand." Appellee's Br. at 16. For the reasons that follow, Sandra's arguments fail.

1. Scope of Remand

Sandra contends that the only issue before the district court on remand was whether she and Don fraudulently transferred the property to Sandra when they executed the August 28, 1989 quitclaim deed. *See Craft I*, 140 F.3d at 644. The IRS claims that this court left open the broader question of whether *any* fraudu-

[21] The IRS had raised the fraudulent conveyance argument as a defense in its answer to Sandra's complaint.

lent conveyance occurred with regard to the Berwyck Property. The *Craft I* court stated as follows:

> [T]here remains an issue of whether a fraudulent conveyance occurred in this case, an issue that the district court did not address. Under Michigan law, one spouse cannot use the doctrine of tenancy by the entirety to defeat the rights of a judgment creditor. Such a fraudulent transfer can be set aside . . . . The issue of whether a fraudulent conveyance occurred in this case is a matter that should be determined by the district court. If the conveyance was fraudulent and therefore set aside, the IRS could be entitled to half the proceeds of the June 1992 sale, or $59,944.10. Accordingly, upon remand, the district court should consider whether the Berwyck Property was transferred for fraudulent purposes.

Id. (citations omitted).

The district court did not exceed the scope of our remand by considering the issue of whether Don's mortgage payments constituted a fraudulent transfer under Michigan law. The last sentence of the above-quoted section of *Craft I*, which directed the district court to "consider whether the Berwyck Property was transferred for fraudulent purposes," does not raise exclusively the question of whether the August 1989 transfer itself was fraudulent; rather, it permitted the district court to consider also whether Don and Sandra transferred the property for other fraudulent purposes as well. *See id.* This conclusion is consistent with the opening sentence of the *Craft I* court's fraudulent conveyance discussion, which states in broad terms that "there remains an issue of whether a fraudulent conveyance occurred in this case." *See id.* It is also consistent with this court's broad statement that, "[t]he issue of whether a fraudulent conveyance occurred in this case is a matter that should be determined by the district court." *See id.* As we read this language, *Craft I* directed the district court to investigate whether the facts of this case constituted a fraudulent conveyance under Michigan law. This is exactly what the district court did. It found that under Michigan law, the August 1989 transfer could not be fraudulent, because Michigan courts have "consistently held that creditors have no right to complain of a debtor's disposition of exempt [*i.e.*, entireties] property because such property could not be reached to satisfy debts had it remained in the debtor's hands." *See, e.g., Cross v. Commons*, 336 Mich. 665, 59 N.W.2d 41, 43 (1953) (en banc). The court went on, however, to find that Don's mortgage payments were fraudulent under an exception to that rule. *See McCaslin*, 292 N.W. at 699. The court's consideration and application of Michigan fraudulent conveyance law was in harmony with the scope of the *Craft I* court's remand, and we reject Sandra's contention otherwise.

2. Implied Consent

Sandra also argues that the district court erred in permitting the IRS to argue its fraudulent enhancement theory upon remand because she did not consent to trial of the issue. The district court found that Sandra had impliedly consented to trial of the fraudulent enhancement theory by failing to object to the IRS's claim until after the trial; by consenting to the Joint Final Pretrial Order, which indicated that the enhancement claim was a controverted issue for trial; and by failing to object at trial to the government's

evidence that Don made payments on behalf of the entireties property from 1979 to 1985, which "could have been relevant only to the Government's contention that Don's payments into the entireties property from 1979 through 1985 while he was insolvent were fraudulent." Sandra asserts that she objected to the fraudulent enhancement theory at the final pretrial conference, "an event for which there is unfortunately no recorded transcript," Appellee's Br. at 18, and in her post-trial brief. Sandra also alleges that the fact that the Joint Final Pretrial Order lists among the "Controverted and Unresolved Issues for Trial" the issue of whether Don made fraudulent conveyances into the tenancy by the entirety at a time when he was insolvent actually shows that she objected to the issue prior to trial. Sandra further argues that she did not object to the enhancement theory at trial because the judge had indicated that the trial would be "relaxed," and that he had ordered the parties to submit their legal arguments as part of their post-trial briefs rather than present them at trial. Lastly, Sandra argues that the evidence that the government put on at trial did not necessarily go to the enhancement issue; thus, her failure to object to it did not imply her consent to try the issue.

"Fed. R. Civ. Pro. [sic] 15(b) states that issues tried by the express or implied consent of the parties shall be treated in all respects as if they had been raised in the pleadings." *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982); *see also* Fed. R. Civ. P. 15(b). Although the parties agree that this court reviews for clear error the district court's finding that the IRS was not precluded from raising the fraudulent enhancement issue, we think the better view is that we review for abuse of

discretion the district court's decision regarding whether an issue not raised in the pleadings has been tried by the implied consent of the parties. *See Moncrief v. Williston Basin Interstate Pipeline Co.*, 174 F.3d 1150, 1160 (10th Cir. 1999); 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1493, at 41 (2d ed. 1990).

The district court did not abuse its discretion in finding that Sandra impliedly consented to trial of the fraudulent enhancement theory. First, because the theory of fraudulent enhancement constitutes a well-established exception to Michigan fraudulent conveyance law, *see supra*, Sandra was on notice from the time of the government's answer to her complaint that fraudulent enhancement could be at issue in the case. Further, as the government points out, although Sandra agreed that *whether the government should prevail* on the enhancement theory was a controverted issue for trial, she did not move to include the question of *whether the government could argue* the theory as a controverted issue in the Joint Final Pretrial Order. Finally, although the trial on remand was, in the words of the court, "more casual than a trial sometimes looks"—the trial took place with the parties, witnesses, and the judge sitting around a table in the courtroom—the court admonished the parties that "it's still a federal court, and all the rules apply." *See Carlyle*, 674 F.2d at 556 (finding that where defendant raised defense for first time at trial, and then offered evidence of the defense, defense was argued by implied consent of the plaintiff for purposes of Rule 15(b)). *Cf. Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992).

Regardless of whether Sandra objected in a timely fashion to the government's theory, her argument fails

because she cannot show that she has been prejudiced by the district court's decision to permit the IRS to argue the enhancement theory. Under Rule 15(b), "a district court may consider claims outside of those raised in the pleadings so long as doing so does not cause prejudice." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569 (2d Cir. 2000); *see also* 6A Wright et al., § 1493, at 36-40 ("Prejudice in this context means a lack of opportunity to prepare to meet the unpleaded issue."). Sandra cannot show that she suffered prejudice simply because the IRS changed its legal theory. *See Cruz*, 202 F.3d at 569. "Instead, a party's failure to plead an issue it later presented must have disadvantaged its opponent in presenting its case." *Id.* (quotation marks and citation omitted). Sandra knew of the government's theory prior to trial because the government had argued it in its pre-trial brief. Further, she argued the issue in her post-trial brief, which the district court considered. She was not prohibited from cross-examining the government's witnesses on the issue if she so chose, and she does not argue that she needed to discover additional evidence to defend against the fraudulent enhancement theory. Thus, the government's argument did not prejudice Sandra, and the issue was tried by her implied consent.

B.

Sandra next argues that the district court erred by failing to find that the government's fraudulent enhancement claim was not barred by the statute of limitations contained in I.R.C. § 6502. Sandra asserts no case law in her favor, and her claim has no merit.

We review de novo a district court's determination that a complaint was filed outside the relevant statute of limitations. *See Tolbert v. State of Ohio Dep't of*

Transp., 172 F.3d 934, 938 (6th Cir. 1999). The parties agree that the IRS assessed Don's federal tax liabilities in July 1988. At that time, § 6502 contained a six-year limitations period within which the IRS could begin collection proceedings on a tax assessment. *See* I.R.C. § 6502(a)(1) (1989). The statute provided that the limitations period begins to run on the date of the assessment of the tax. *See id.* Thus, under the statute in effect at the time, the IRS had until July 1994 to begin collection proceedings against Don. However, Congress amended the statute in 1990 to increase the § 6502 limitations period to ten years. *See* I.R.C. § 6502 (Historical and Statutory Notes). The amendment applied the new ten-year period to taxes already assessed for which the six-year limitations period had not expired. *See id.* Because Don's tax debts had already been assessed and the six-year limitations period had not run on the IRS's claim, the ten-year limitations period applied to Don's tax debts. Accordingly, the IRS had until July 1998 to begin collection proceedings against Don.

The government filed its answer to Sandra's complaint in July 1993. Because the government's fraudulent enhancement claim was tried by implied consent, *see supra*, its claim must be "treated in all respects as if [it] had been raised in the pleadings." *See* Fed. R. Civ. P. 15(b). The claim is thus deemed filed on the date that the IRS filed its answer in July 1993, well within the ten-year limitations period that began running in July 1988. *See id.*; Fed. R. Civ. P. 15(c).

C.

Sandra argues that Don's death in August 1998 makes moot the IRS's remedy in this case. She claims that the government stipulated at an early point in the

case that its lien attached to proceeds of the sale of the Berwyck Property to the same extent that the lien attached to the property itself;[22] once this court found that the tax lien did not attach to the property, *see Craft I*, 140 F.3d at 643-44, the lien attached to nothing and the IRS had nothing to enforce. In the alternative, Sandra asserts that the *Craft I* holding requires that the government's lien against the property was unenforceable until either Don and Sandra died, or until the couple divorced. *See Leroy Lane II*, 972 F.2d at 138. Under Sandra's theory, the proceeds of the sale of the entireties property revert to Sandra upon Don's death, and the IRS cannot reach them. These theories fail.

We review questions of mootness de novo. *See Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994). By operation of law, the IRS's lien attached to all of Don's property and rights to property. *See* I.R.C. § 6321. Although this court found that Don had no individual interest—present or future—in the entireties property, *see Craft I*, 140 F.3d at 643-44, the IRS did not gain recovery upon a theory that Don had an individual interest in the entireties property. Rather, the district court found that the IRS could recover the value of mortgage payments Don made on behalf of the entireties property under a fraudulent enhancement theory. In other words, Don essentially hid funds to which the IRS was entitled (by virtue of its lien) by investing them in a property to which the lien could not attach. *See McCaslin*, 292 N.W. at 699; *accord Hoerner v.*

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[22] The government disputes the stipulation to which Sandra refers, arguing that it agreed to release of the proceeds upon "resolution of the tax lien dispute." The exact nature of the stipulation is not clear from the record, but that does not impede our resolution of the issue. *See infra*.

Elkins (In re Elkins), 94 B.R. 932, 934-35 (Bankr. W.D. Mich. 1988). Thus, Sandra's arguments, which presume that the district court awarded the IRS proceeds of the sale of the property on the basis that Don had some kind of individual interest in the Berwyck Property, are misplaced. Rather, the court awarded the IRS's remedy on the basis that Don used his own funds to enhance the property in order to avoid paying his tax debts.

D.

On October 26, 1995, the district court ordered that the government receive $50,293.94 of the escrowed proceeds from the sale of the Berwyck Property. Subsequent to this court's remand, the district court determined that the government was entitled to only $6,693 from the escrowed sales proceeds. Sandra argues that, pursuant to 28 U.S.C. § 2411, she is entitled to interest on the $43,600.94 (*i.e.*, $50,293.94 less $6,693) that the government has possessed since October 1995.

Section 2411 provides as follows:

> In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such

date to be determined by the Commissioner of Internal Revenue.

28 U.S.C. § 2411. Citing *Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 834 (5th Cir. 1993), the district court denied Sandra's motion for an award of interest on the basis that "[§ 2411] applies only to tax refund cases." The court reasoned that the statute's use of the terms "overpayment" and "payment" indicates that it was intended to apply only in cases where the taxpayer has paid a disputed tax liability and then seeks a refund. Because Sandra brought the instant case as an action to quiet title rather than as a tax refund case, and because the government obtained Sandra's funds pursuant to a court judgment rather than by virtue of an overpayment or payment of tax obligations, the court rejected Sandra's request for interest payments. We review de novo the district court's interpretation of § 2411. *See State of Mich. v. United States*, 141 F.3d 662, 664 (6th Cir. 1998).

Sandra asserts that § 2411 applies to her case because the funds she will recover constitute an overpayment, and because she will recover them pursuant to a court judgment. The IRS responds that a plaintiff may not collect interest against the federal government unless it has specifically waived its sovereign immunity, and § 2411 contains no such waiver for suits to quiet title. In addition, the IRS argues that the funds Sandra will receive are not an "overpayment" of taxes. *See* 28 U.S.C. § 2411.

A plaintiff may not recover interest from the federal government in the absence of an express waiver of its sovereign immunity from suit. *See Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S. Ct. 2957, 92 L.Ed.2d

250 (1986). In determining whether Congress has expressly waived the government's immunity, a court must "construe waivers strictly in favor of the sovereign, and not enlarge the waiver beyond what the language requires." *Id.* at 318, 106 S. Ct. 2957 (citations and quotation marks omitted). As the *Shaw* Court noted, Congress has expressly authorized interest claims against the government in the circumstances described by § 2411. *See id.* at 318-19 n.6, 106 S. Ct. 2957. Because § 2411 authorizes payment of interest based upon "any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax," the question in this case becomes whether the escrowed $43,600.94 held by the IRS constitutes an "overpayment" with respect to an internal-revenue tax. *See* 28 U.S.C. § 2411.

As did the district court, the government relies on *Spawn* to suggest that an "overpayment" refers only to tax refunds. *See* 989 F.2d 830. The *Spawn* court stated that § 2411 "expressly authorizes awards of prejudgment and postjudgment interest against the United States in tax refund cases." *Id.* at 834. But the court made this statement only in passing—*Spawn* was not a tax case—and lifted it directly from the Supreme Court's description of § 2411 in *Shaw*. *See id.* (citing *Shaw*, 478 U.S. at 318-19 n. 6, 106 S. Ct. 2957). In *Shaw*, the Supreme Court simply cited § 2411 as one of several examples of Congress expressly waiving the government's immunity with respect to interest awards, describing § 2411 in a parenthetical as "expressly authorizing prejudgment and postjudgment interest payable by the United States in tax-refund cases." *Shaw*, 478 U.S. at 318-19 n.6, 106 S. Ct. 2957. This parenthetical description of a statute, contained in

a footnote within dicta, is not dispositive of the meaning of § 2411.

The language of § 2411 is broad. *Cf. Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 531, 68 S. Ct. 229, 92 L.Ed. 142 (1948). Sandra, however, has not met her burden of proof on the interest claim. The only case she cites in support of her theory is *Steiner v. Nelson*, 199 F.Supp. 441 (E. D. Wis. 1961), *aff'd*, 309 F.2d 19 (7th Cir. 1962). In *Steiner*, the court held that even where the IRS obtains funds from a taxpayer based on an illegal tax assessment, the taxpayer is *not* entitled to interest under § 2411. *See* 199 F. Supp. at 441-42. Thus, as the government notes, *Steiner* actually lends support to *its* position. Although we are not bound by the reasoning or result of the *Steiner* court, we hold that, on the facts of this case, Sandra has failed to carry her burden of proving her case pursuant to § 2411.

E.

In June of this year, Sandra filed a motion with this court to recover litigation costs pursuant to either the Equal Access to Justice Act, 28 U.S.C. § 2412, or under Fed. R. App. P. 38. The panel deferred ruling on the motion until oral argument. In the motion, Sandra argues that the government's appeal simply asserts the same issue, arguments, and case law rejected by the *Craft I* panel. Because the government is bound by the law of the case doctrine, Sandra claims its appeal is brought in bad faith. The government responds that Sandra should be denied costs because it was substantially justified in bringing its appeal, *see* I.R.C. § 7430, and because its appeal is not frivolous, as required by Rule 38.

Fed. R. App. P. 38. That rule provides:

> If a court of appeals determines that an appeal is frivolous, it may after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

In *Martin v. CIR*, this court warned litigants of our "ample authority" to assess double costs and "just damages" against an appellant in a frivolous appeal: "In future such cases this court will not hesitate to award damages when the appeal is frivolous, or taken merely for purposes of delay, involving an issue or issues already clearly resolved." 756 F.2d 38, 41 (6th Cir. 1985) (quotation marks omitted); *accord Sisemore v. United States*, 797 F.2d 268, 271 (6th Cir. 1986); *Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670, 676 (6th Cir. 1999). Recently, this court concluded that even though an appeal is not made in "bad faith," an appellee may garner costs if an appeal is "wholly without merit." *Wilton Corp.*, 188 F.3d at 677. Although the IRS's appeal is precluded by both the law of the case and law of the circuit doctrines, we have acknowledged that the government raised colorable—if not persuasive—arguments in its appeal, *see supra*. Accordingly, we deny Sandra's motion for costs pursuant to Rule 38.

We also deny Sandra's motion for costs pursuant to § 2412. Sandra has failed to articulate why she merits costs pursuant to that statute. Rather, she simply reasserts her argument that the government's appeal is precluded at this time. Further, certain monetary awards in tax cases may be awarded only pursuant to I.R.C. § 7430. *See* 28 U.S.C. § 2412(e); *see also Sisemore*, 797 F.2d at 271. The provisions of § 7430 are "not

automatic," and "are limited by a whole host of conditions and requirements." *Beaty v. United States*, 937 F.2d 288, 292 (6th Cir. 1991). Sandra has articulated none of these conditions or requirements, and, indeed, has failed even to discuss whether § 7430 applies to her case. Accordingly, we reject her motion for costs.[23]

IV. CONCLUSION

For the reasons discussed above, we **DISMISS** the government's appeal as precluded by both the law of the case and law of the circuit doctrines. We further **AFFIRM** the district court's judgment, and **DENY** Sandra's motion for litigation costs brought pursuant to Rule 38 and 28 U.S.C. § 2412.

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[23] The motion also sought dismissal of the government's appeal. We DENY Sandra's motion in its entirety.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring in the judgment. Because I agree that we are bound by *Craft I* for the reasons that are well stated in the court's opinion, I concur in the judgment. I also fully concur in the court's disposition of Sandra Craft's cross-appeal. Nevertheless, I believe that the result reached in *Craft I*, and that this court endorses today, is inconsistent with Supreme Court precedent and should be reversed. I therefore write separately to identify the bases for my disagreement with *Craft I* and to recommend that this case be revisited en banc.

As Judge Ryan pointed out in his dissent in *Craft I*, the legal landscape has changed considerably since 1971, when this court held in *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971), that a federal tax lien against an individual taxpayer cannot attach to property held by that taxpayer as a tenant by the entirety. In the interim, the Supreme Court has made clear that the IRS's power under 26 U.S.C. § 6321 to attach the individual property rights of a delinquent taxpayer is extensive, if not plenary. *See United States v. National Bank of Commerce*, 472 U.S. 713, 719-20, 105 S. Ct. 2919, 86 L.Ed.2d 565 (1985) (holding that § 6321 "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have"); *Jewett v. Commissioner of Internal Revenue*, 455 U. S. 305, 309, 102 S. Ct. 1082, 71 L.Ed.2d 170 (1982) (concluding that Congress intended federal tax liens to attach to "every species of right or interest protected by law and having an exchangeable value" (citation and

internal quotation marks omitted)). Although state property law determines what rights to property a person enjoys, federal law dictates whether a tax lien may attach to those rights. *See National Bank of Commerce*, 472 U.S. at 722, 727, 105 S. Ct. 2919.

In the years since *Cole*, the Supreme Court has held that state law "legal fictions" will be ignored insofar as the federal tax laws are concerned. *See United States v. Irvine*, 511 U.S. 224, 240, 114 S. Ct. 1473, 128 L.Ed.2d 168 (1994). The *Irvine* Court considered whether the federal gift tax applied to a transfer that occurred when a mother disclaimed her interest in a trust, thereby allowing that interest to pass to her children. Upon the termination of a trust established by her grandfather, Sally Irvine became entitled to a share of the trust principal. She disclaimed part of her share, effectively transferring that part to her children. Under Minnesota law, "an effective disclaimer of a testamentary gift is generally treated as relating back to the moment of the original transfer of the interest being disclaimed, having the effect of canceling the transfer to the disclaimant *ab initio* and substituting a single transfer from the original donor to the beneficiary of the disclaimer." *Id.* at 239, 114 S. Ct. 1473. Thus, the share that Irvine's children received was considered by Minnesota law as if it had never been possessed by Irvine, but rather as if it had been transferred directly from the trust to Irvine's children.

Nevertheless, the Supreme Court held that Irvine's disclaimer in favor of her children was taxable, declaring that "the federal gift tax is not struck blind by a disclaimer." *Id.* at 240, 114 S. Ct. 1473. In other words, for federal tax purposes, the key inquiry is what rights an individual actually possesses under state law, not

how the state characterizes those rights. *See id.; see also Drye v. United States*, 528 U.S. 49, 120 S. Ct. 474, 482 n.5, 145 L.Ed.2d 466 (1999) ("[I]t is not material that the economic benefit to which the [taxpayer's local law property] right pertains is not characterized as 'property' by local law." (quoting W. Plumb, Federal Tax Liens 27 (3d ed. 1972) (alterations in original))).

The appropriate inquiry, then, as stated by Judge Ryan in *Craft I*, is "what state-defined rights, if any, did Don Craft have in the Berwyck property?" *Craft I*, 140 F.3d 638, 645 (Ryan, J., concurring). First, Don Craft had the right to enter and enjoy the property to the exclusion of all others, except for Sandra Craft. *See* Mich. Comp. Laws § 557.71. If the Crafts had decided to rent or sell the property, Don Craft would have received half of the proceeds. *See id.* He further possessed a contingent future interest, because he would have taken the entire estate in fee simple if Sandra had predeceased him. *See Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 293 (1984) ("[E]ach spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship."). Finally, if the Crafts had divorced, they would have become tenants in common, and Don Craft would have had the right to bring an action for partition and sale. *See* Mich. Comp. Laws § 552.102.

The fact that Don Craft could not have independently sold his share in the tenancy by the entirety does not alter the fact that his rights to the property had value. "Under the great weight of federal authority, . . . such restraints on alienation are not effective to prevent a federal tax lien from attaching under 26 U.S.C. § 6321." *Bank One Ohio Trust Co. v. United States*, 80 F.3d 173, 176 (6th Cir. 1996).

The majority in *Craft I* was aware of these rights, and acknowledged that "a federal tax lien can attach to a future or contingent interest in property." *Craft I*, 140 F.3d at 644. *Craft I* rejected the IRS's claim, however, on the ground that "state law determines the nature of the legal interest which a taxpayer has in a property," and "[i]n Michigan, it is well established that one spouse does not possess a separate interest in an entireties property." *Craft I*, 140 F.3d at 643-44.

I believe that the *Craft I* majority committed a subtle but critical error in accepting at face value Michigan's *description* of the property interests held by a tenant by the entirety, rather than looking past that description to the *actual substance* of those interests under Michigan law. In *Irvine*, the Supreme Court acknowledged that, under Minnesota law, a disclaimant is considered as if she never held any interest in the property whatsoever. *Irvine*, 511 U.S. at 239. Nevertheless, the Court looked past Minnesota's characterization of Irvine's property interest and held that the gift tax could attach because, in actuality, Irvine exercised control over the disposition of the property—a right that had unquestionable value. *Id.* at 240.

In contravention of *Irvine*, the majority in *Craft I* failed to look past Michigan's characterization of an individual's interest in entireties property and ignored the substantial rights actually held by Don Craft, which similarly had undeniable value. In other words, I believe that the majority in *Craft I* was "struck blind" by Michigan's "legal fictions."

To my mind, then, *Craft I* reached the wrong result, and the IRS ought to have had the right to attach Don Craft's valuable interest in the tenancy by the entirety. Nevertheless, two related doctrines require that I

concur with the result reached by the court. The first is the law-of-the-case doctrine, which provides that "[a]n earlier appellate court's decision [in the same case] as to a particular issue may not be revisited unless 'substantially new evidence has been introduced, . . . there has been an intervening change of law, or . . . the first decision was clearly erroneous and enforcement of its command would work substantial injustice.' "*United States v. Corrado*, 227 F.3d 528, 533 (6th Cir. 2000) (citation omitted). Second, the law-of-the-circuit doctrine provides that, absent an intervening change in the law, "a panel of this court may not overrule a previous panel's decision." *Meeks v. Illinois Cent. Gulf R.R.*, 738 F.2d 748, 751 (6th Cir. 1984).

Craft I is both the law of this case and the law of the circuit. Without delving into the precise differences between the two, suffice it to say that the law-of-the-circuit is the stronger of the two doctrines, and therefore provides the relevant test for whether *Craft I* can be revisited by this panel. *See LaShawn v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("While the law-of-the-case doctrine offers several exceptions . . . the law-of-the-circuit doctrine is much more exacting."). Under the law-of-the-circuit doctrine, a subsequent panel can only revisit an earlier panel's decision if there has been "a change in the substantive law or an intervening Supreme Court decision." *Smith v. U.S. Postal Service*, 766 F.2d 205, 207 (6th Cir. 1985). There has been no substantive change since *Craft I* to the relevant provisions of either Michigan property law or federal tax law.

The IRS argues, however, that the case of *Drye v. United States*, 528 U.S. 49, 120 S. Ct. 474, 145 L.Ed.2d 466 (1999), decided after *Craft I*, is a contrary, inter-

vening Supreme Court decision. In that case, a delinquent taxpayer who was subject to a federal tax lien disclaimed any interest in his mother's estate after her death, causing the estate to pass to his daughter. Under the relevant state law, "such a disclaimer creates the legal fiction that the disclaimant predeceased the decedent," with the consequence that "[t]he disavowing heir's creditors . . . may not reach property thus disclaimed." *Id.* at 476. Nevertheless, the Supreme Court relied on *Irvine* and disregarded the legal fiction, holding that the taxpayer's interest in his mother's estate was a "right to property" subject to the federal tax lien.

Sandra Craft responds that *Drye* does not represent a change in the law, but is simply a reaffirmation and application of prior cases in this area. I agree. To the extent that *Drye* is inconsistent with *Craft I*—and I believe that it is—that inconsistency was considered, and rejected, by this court in *Craft I* in its discussion of *Irvine* and *National Bank of Commerce*. Although the IRS is technically correct that *Drye* is a "subsequent, contrary view of the law by a controlling authority," this formulation is incomplete. The purpose of the intervening-controlling-authority exception is to allow a subsequent panel of this court to respond to a new *precedent*, unavailable to the prior panel, not just a new *decision*. Otherwise, a loophole would exist under which a subsequent panel could freely revisit a decided issue simply by referencing a later Supreme Court decision that does nothing more than restate the existing precedent. "Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit." *LaShawn*, 87 F.3d at 1395 (examining the law- of-the-circuit doctrine).

I disagree, however, with the court's conclusion in Part II.A.2. that "*Craft I* is essentially consistent with the *Drye* Court's reasoning." Op. at 366. The court also asserts that "under Michigan law, Don had no individual interest in the entireties property." Op. at 367. I do not believe that this statement squares with either reality or with Michigan law. As discussed above, Don Craft in fact possessed at the very least a contingent future interest under Michigan law and would have taken the entire estate in fee simple had he survived Sandra. *See Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 293 (1984).

Furthermore, the court goes too far when it suggests that the IRS is arguing that "*Drye* stands for the proposition that a federal tax lien attaches to any right to inherit property, no matter how remote." Op. at 368-69. A key distinction between a tenancy by the entirety and a contingent expectancy is the latter's revocability. Although a hoped-for inheritance could be subject to the whims of an ailing, fickle relative, the rights associated with an entireties property are clearly irrevocable. Such was the case with the Berwyck property.

In sum, I believe that we are bound by the holding of *Craft I*, and I therefore concur in the result reached by the court. But I also believe that *Craft I* contravenes recent Supreme Court decisions and would therefore recommend that this case be revisited en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-1734; 99-1737

SANDRA L. CRAFT,
PLAINTIFF -APPELLEE/CROSS-APPELLANT

v.

UNITED STATES OF AMERICA,
ACTING THROUGH THE COMMISSIONER
OF INTERNAL REVENUE,
DEFENDANT -APPELLANT/CROSS-APPELLEE

Before: KEITH, COLE, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the government's appeal is DISMISSED as precluded by both the law of the case and law of the circuit doctrines. IT IS FURTHER ORDERED that the judgment of the district court regarding plaintiff Sandra Craft's claims is AFFIRMED.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
LEONARD GREEN, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-1734/1737

SANDRA L. CRAFT,
PLAINTIFF -APPELLEE/CROSS-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT/CROSS-APPELLEE

Before: KEITH, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
LEONARD GREEN, CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-1038, 96-1039

SANDRA L. CRAFT,
PLAINTIFF -APPELLANT/CROSS-APPELLEE

v.

UNITED STATES OF AMERICA,
ACTING THROUGH THE COMMISSIONER
OF INTERNAL REVENUE,
DEFENDANT -APPELLEE/CROSS-APPELLANT

Argued September 16, 1997
Decided and Filed: April 1, 1998

Before: RYAN, SUHRHEINRICH, and COLE, Circuit Judges.

COLE, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. RYAN, J. (pp. 645-649), delivered a separate concurring opinion.

OPINION

COLE, Circuit Judge

R. GUY COLE, Jr., Circuit Judge. Sandra Craft appeals the district court's order granting summary judgment in favor of the United States, in which the district court found that a federal tax lien filed against the property of Sandra's husband for his individual unpaid tax liabilities attached to property held by Sandra and her husband, first as tenants by the entirety and then jointly conveyed to Sandra. The United States, in turn, cross-appeals the district court's determinations of when the lien attached and the value of Sandra's husband's interest in the property. For the following reasons, we **REVERSE** the district court's grant of summary judgment in favor of the United States and **REMAND** for further proceedings in accordance with this opinion.

I.

Sandra Craft and her husband, Don, purchased real property located at 2656 Berwyck Road in Grand Rapids, Michigan (hereinafter the "Berwyck Property") as tenants by the entirety on May 26, 1972 for $48,000, encumbered by a $37,000 mortgage. Don failed to file income tax returns for the taxable years 1979 through 1986. The Internal Revenue Service accordingly prepared substitute income tax returns for these years as permitted by the provisions of 26 U.S.C. § 6020(b) and assessed $482,446.73 in unpaid tax liabilities against him. The IRS advised Don of these liabilities in 1988; Don nonetheless failed to pay these assessments. The IRS then filed a notice of federal tax lien on March 30, 1989 against all of Don's property or rights in property with the Register of Deeds in Kent County, Michigan.

Don and Sandra thereafter executed a quitclaim deed on the Berwyck Property, transferring the property to Sandra in exchange for one dollar on August 28, 1989. On January 30, 1992, Don filed a petition for relief

under Chapter 7 of the Bankruptcy Code. The bankruptcy court entered a discharge order on June 1, 1992 and closed the case on June 11, 1992.

Sometime later, Sandra entered into a contract to sell the property, but a title search revealed the IRS's lien and prevented the sale. Upon Sandra's request, the IRS refused to release the lien. Don then filed a motion to reopen the bankruptcy case on August 14, 1992, and also filed an adversary complaint against the IRS that sought to determine the dischargeability of the federal tax lien. Although the bankruptcy court reopened the case, it determined on January 27, 1993 that it did not have jurisdiction to determine the validity of the government's lien on the Berwyck Property because the property never had become a part of Don's bankruptcy estate. The bankruptcy court thus closed the case for a second time.

The IRS subsequently agreed to release its lien on the property to enable Sandra to sell it. The IRS conditioned its release on the establishment of a non-interest-bearing escrow account containing fifty percent of the proceeds of the sale and subject to the same right, title, and interest that the federal tax lien had on the property. Sandra finally sold the property in June 1992 and received half the proceeds, amounting to $59,944.10.

On April 23, 1993, Sandra filed a complaint pursuant to 28 U.S.C. § 2410(a) in the United States District Court for the Western District of Michigan against the United States, seeking to quiet title to the proceeds in the escrow account. The government asserted in response that the federal tax lien attached to Don's interest in the property, even though Don and Sandra had held the property as tenants by the entirety, and

that it was entitled to half the proceeds from the sale of the property. The government further asserted that Don's conveyance to his wife was fraudulent.

Sandra filed a motion for summary judgment on September 10, 1993, arguing that the completion of the bankruptcy proceedings estopped the government's ability to bring an action for fraudulent conveyance. On September 13, 1993, the government also filed a motion for summary judgment, contending that the federal tax lien had attached to Don's interest in the property.

Following a hearing on the parties' motions on July 21, 1994, the district court issued an opinion and order on September 12, 1994, denying Sandra's motion for summary judgment and granting the government's motion. The district court found that the federal tax lien attached to the property at the time Don and Sandra conveyed the property to Sandra, stating, in essence, that this conveyance effectively: (1) terminated the tenancy by the entirety; (2) after which, each spouse owned an equal one-half interest; and (3) was followed by the conveyance of the property to Sandra. The federal tax lien thus attached at the moment in time that Don possessed a separate one-half interest in the property.

On September 22, 1994, Sandra filed four motions: the first sought either to amend the judgment to include the conclusions of law supporting denial of her motion for judgment against the government's action for fraudulent conveyance, or, in the alternative, a new trial; the second sought to amend the judgment to include a determination of the value of Don's interest in the property on the date when Don and Sandra terminated the tenancy by the entirety; the third sought to refer the case to the bankruptcy court for it to make

this determination; and, the fourth sought to stay execution of the judgment pending resolution of the other motions.

The district court entered another opinion and order on November 17, 1994, denying Sandra's first motion and stating that, having resolved the matter on other grounds, it did not need to decide whether a fraudulent conveyance had occurred. However, the court granted Sandra's second motion, concluding that further proceedings were necessary to determine the value of Don's interest at the time of the termination of his joint tenancy. Still, the court found that it, and not the bankruptcy court, was the proper forum to make this determination and thus denied Sandra's third motion. Finally, the court granted Sandra's fourth motion and stayed execution of the judgment.

Following a telephonic hearing on September 11, 1995, the district court issued an opinion on October 26, 1995, finding that the government held a valid lien on the interest Don held in the property on August 28, 1989—the date of the termination of the entireties estate and the subsequent conveyance to Sandra. The parties stipulated that the property had a fair market value of $120,000 and an outstanding mortgage balance of $19,412.12 on August 28, 1989. The district court thus determined that Don's interest in the property at the time of the conveyance was $50,293.94 and entered a final judgment awarding the government this amount.

Sandra timely filed her appeal on December 22, 1995. The government timely filed its notice of cross-appeal on December 26, 1995.

II.

We review de novo a district court's grant of summary judgment. *Harrow Prods., Inc. v. Liberty Mutual Ins. Co.*, 64 F.3d 1015 (6th Cir.1995); *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir.1995). Summary judgment is appropriate if the record shows "that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We assess the record in the light most favorable to the non-movant, drawing all reasonable inferences in its favor. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986).

III.

A.

The Internal Revenue Code provides for the creation of a federal tax lien on a taxpayer's property, stating that: "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321. Under the succeeding section, the Code further provides that the lien generally arises when the assessment is made, and it continues until the taxpayer's liability "is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322.

Federal tax law "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. Bess*, 357 U.S. 51, 55, 78 S. Ct. 1054, 1057, 2 L.Ed.2d 1135 (1958). Thus, in order to determine whether property is subject to a federal tax lien, "'state law controls in

determining the nature of the legal interest which the taxpayer had in the property.' "*Aquilino v. United States*, 363 U.S. 509, 513, 80 S. Ct. 1277, 1280, 4 L.Ed.2d 1365 (1960) (quoting *Morgan v. Commissioner*, 309 U.S. 78, 82, 60 S. Ct. 424, 426, 84 L.Ed. 585 (1940)). "'[O]nce it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *United States v. National Bank of Commerce*, 472 U.S. 713, 722, 105 S. Ct. 2919, 2925, 86 L.Ed.2d 565 (1985) (quoting *Bess*, 357 U.S. at 56-57, 78 S. Ct. at 1057- 58). Under federal tax law, the government's tax liens attach to every interest in property a taxpayer might have, regardless of whether that interest is less than full ownership or is only one among several claims of ownership. *United States v. Safeco Ins. Co. of America, Inc.*, 870 F.2d 338, 341 (6th Cir.1989) (citing *National Bank of Commerce*, 472 U.S. at 725, 730, 105 S. Ct. at 2926-27, 2929).

B.

In the present case, Sandra and her husband held the Berwyck Property as tenants by the entirety. Under Michigan law, a tenancy by the entirety can be held only by a husband and wife, who possess an interest in the property under single title with a right of survivorship. *See Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880 (1918); *Matter of Grosslight*, 757 F.2d 773, 775 (6th Cir.1985). In Michigan, a tenancy by the entirety can be created only by a written instrument of conveyance, which produces unity of persons, time, title, interest, and possession. *See Rogers v. Rogers*, 136 Mich. App.125, 356 N.W.2d 288, 292-93 (1984). Neither

husband nor wife acting alone can alienate any interest in the property, nor can creditors of one spouse levy upon the property. *See Grosslight*, 757 F.2d at 773. Further, creditors of one spouse cannot reach that spouse's share of proceeds from a foreclosure sale of an entireties property. *See Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655, 62 N.W.2d 619, 623 (1954). If a marriage terminates in divorce, however, Michigan law converts an entireties estate into a tenancy in common by operation of statute. *See* M.C.L.A. § 552.102; *United States v. Certain Real Property Located at 2525 Leroy Lane*, 910 F.2d 343, 351 (6th Cir.1990) (*"Leroy Lane I")*. Husband and wife can also terminate an entireties estate by joint conveyance of the property by husband and wife. *See Leroy Lane I*, 910 F.2d at 351.

Although the government may levy entireties property for nonpayment of real estate taxes on the real property itself under Michigan law, *see, e.g., Robbins v. Barron*, 32 Mich. 36 (1875), we have held that the federal government may not, under Michigan law, attach a lien to the entireties property to satisfy the personal tax liability of a single spouse. *See Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971). In *Cole*, the IRS filed a lien against property held by a husband and wife as tenants by the entirety for unpaid tax assessments against the husband. *See id.* at 1338. We held that:

> the federal tax lien does not attach to the subject property owned by [a husband] and [wife] by the entirety, because the Government's tax lien is against [the husband] only. If the lien constitutes a cloud on the title to the property, [husband and wife] are therefore entitled to have the lien declared a nullity as to the property.

Id. at 1343. In *Cole*, we concluded that "the lien is without legal effect as it pertains to [the husband's and wife's] house." *Id.* at 1344.

After *Cole*, we had occasion to consider again the entireties estate under Michigan law in *Leroy Lane I*. *See* 910 F.2d at 343. In that case, the United States seized entireties property under a criminal forfeiture statute; however, the district court awarded all the proceeds from the forced sale of the property to the innocent spouse. *See id.* at 344. On appeal, we found that the government's position with respect to the forfeiture was most analogous to the position of a judgment creditor of one spouse. *See id.* at 351. In discussing the entireties estate, we reiterated that "entireties property may not be attached to satisfy the personal tax liability of a single spouse," *id.* at 350 (citing *Cole*, 441 F.2d at 1343), and noted that the innocent spouse had "not only an indivisible interest in the entireties property, but also a survivorship interest which would entitle her to sole ownership of the property upon her husband's death." *Id.* at 347.

Upon remand, the district court, having discovered that the couple divorced, again awarded all the proceeds to the innocent spouse based on the division of property as set out in the divorce decree. *See United States v. Certain Real Property Located at 2525 Leroy Lane*, 972 F.2d 136, 137 (6th Cir.1992) ("*Leroy Lane II*"). In *Leroy Lane II*, we again reiterated that, under Michigan law, a judgment creditor cannot levy against the entireties estate to satisfy one spouse's debt and further noted that the government's interest does not come into being until the entireties estate is destroyed. *See* 972 F.2d at 138. We thus held that the government was entitled only to whatever interest the debtor-

spouse held after the entireties estate was destroyed; in *Leroy Lane II*, that was a zero amount because the debtor- spouse received no interest in the property pursuant to the divorce decree.[1] *See id.*

C.

Turning to the present case, Sandra argues on appeal that *Cole* remains controlling authority and that because Michigan substantive real property law has not changed, the IRS's tax lien could not attach to Don's interest in the Berwyck Property. It was error, Sandra continues, for the district court to find that the lien attached because it was a nullity as to the entireties property. Thus, Sandra disputes the district court's finding that upon the joint conveyance of the Berwyck Property to Sandra, the tenancy by the entirety was terminated and Don—for a moment in time—owned a one-half interest in the property to which the lien could attach.

The United States, on the other hand, goes a step further than the district court, contending that the lien attached to the Berwyck Property at the time the lien arose. In so arguing, the United States relies on two Supreme Court decisions in which the federal government's interests have trumped state law. *See United States v. Irvine*, 511 U.S. 224, 114 S. Ct. 1473, 128 L.Ed.2d 168 (1994); *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132, 76 L.Ed.2d 236 (1983).

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1 We nonetheless voiced concern about the United States' lack of opportunity to assert its entireties interest prior to the Michigan Circuit Court's grant of the divorce and remanded the case for such evidence as was necessary to insure total disclosure to the Michigan Circuit Court. *See Leroy Lane II*, 972 F.2d at 138.

The United States cites *Irvine* for the proposition that federal laws cannot be avoided or "struck blind" by state-law legal fictions. 511 U.S. at 240, 114 S. Ct. at 1482. *Irvine* addressed the issue of whether a taxpayer's disclaimer of her remainder interest in a trust—which caused her interest to be distributed to her children—resulted in a taxable gift. *See id.* The taxpayer argued that under Minnesota law, an effective disclaimer was valid ab initio, as if the disclaiming party never owned the property; thus, there was no taxable transfer. *See id.* at 227-28, 114 S. Ct. at 1475-76. The Supreme Court disagreed. In citing *Irvine*,the government thus contends that Michigan's recognition of the entireties estate—like Minnesota's disclaimer—is invalid because it is a legal fiction that facilitates the circumvention of federal tax laws.

In *Rodgers*, a case also cited by the government, the Court held that homestead rights under Texas law did not protect property—or a nondelinquent spouse—from in rem proceedings under 26 U.S.C. § 7403. *See* 461 U.S. at 692-700, 103 S. Ct. at 2142-46. The Court based its ruling on a broad interpretation of the tax laws, which permitted the government to "subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." *Id.* at 692, 103 S. Ct. at 2142. The Court did, however, formulate a mechanism whereby the nondelinquent spouse would be compensated. *See id.* at 710-11, 103 S. Ct. at 2151-52. Moreover, the Court recognized that tenancies by the entirety posed a problem distinct from that of homestead estates, in that neither spouse owns an independent interest in an entireties property while both spouses own independent interests in a homestead estate. *See id.* at 702 n. 31, 103 S. Ct. at 2147 n. 31.

We are not persuaded that the Supreme Court decisions cited by the United States have any effect whatsoever on the government's ability to attach a lien to an entireties estate, because these cases do not alter the basic tenet that state law governs the issue of whether any property interests exist in the first place. *See id.* at 683, 103 S. Ct. at 2137. *Irvine* and *Rodgers* stand for the proposition that once a property interest exists under state law, state law cannot interfere with attachment of a lien to that property interest—a matter that is governed by federal law. *See id. Irvine* and *Rodgers* do not support the proposition that federal law can be used to trump a state's definition of a property interest.

In Michigan, it is well established that one spouse does not possess a separate interest in an entireties property. *See, e.g., Rogers*, 356 N.W.2d at 292-93. This principle of Michigan law has not been overruled by Michigan courts, nor trumped by federal law, despite the United States' arguments to the contrary. Because Michigan law does not recognize one spouse's separate interest in an entireties estate, a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate.

D.

In the alternative, the government argues—and the district court held—that upon the conveyance of the Berwyck Property to Sandra, the entireties estate terminated and Don, for a transitory moment, had an undivided one-half interest in the property, to which the lien could attach.

Although the entireties estate was terminated upon conveyance of the Berwyck Property to Sandra, Don's interest in the property terminated at the same time. We are unaware of any precedent indicating that an entireties estate is automatically transformed into a tenancy in common as an intermediary step in the conveyance of the property. To the contrary, it is clear that at the time the entireties estate terminated, Sandra was vested "with full and complete title." *Hearns*, 53 N.W.2d at 320. Thus, Don never held an interest in the Berwyck Property to which the United States' lien could attach.

E.

Despite our conclusion that the IRS lien could not attach to the entireties property per se, an issue remains regarding whether the lien attached to any inchoate interest that Don possessed in the entireties property. It is axiomatic that a federal tax lien can attach to "rights to property" as well as to the property itself. *See, e.g., National Bank of Commerce*, 472 U.S. at 730, 105 S. Ct. at 2929. It follows that a federal tax lien can attach to a future or contingent interest in property. *See, e.g., Safeco Ins. Co.*, 870 F.2d at 341. Although federal law controls whether an interest constitutes such a "right to property," *see National Bank of Commerce*, 472 U.S. at 727, 105 S. Ct. at 2933 (citation omitted), state law determines the nature of the legal interest which a taxpayer has in a property. *See Aquilino*, 363 U.S. at 513, 80 S. Ct. at 1280. Under federal law, then, any separate future interest that Don had in the Berwyck Property would be subject to attachment; however, the nature of that interest must be determined by Michigan law.

Michigan law does not recognize a severable future interest held by one spouse in an entireties property. *See Sanford v. Bertrau*, 204 Mich. 244, 169 N.W. 880, 881 (1918) ("We think the better doctrine is that the right of survivorship is merely an incident of an estate by entirety, and does not constitute a remainder, either vested or contingent."); *see also Budwit v. Herr*, 339 Mich. 265, 63 N.W.2d 841, 844 (1954) (citing *Sanford*, 169 N.W. at 881). *But see Leroy Lane I*, 910 F.2d at 352 ("[W]e have found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entireties estate."). Although statements in *Leroy Lane I* arguably might be construed to indicate the existence of a future interest subject to attachment in an entireties estate, *see Fischre* v. *United States*, 852 F. Supp. 628, 630 (W.D. Mich. 1994), we are bound to define Don's future interests in the Berwyck Property under Michigan law. *See Aquilino*, 363 U.S. at 513, 80 S. Ct. at 1280. Michigan law, as set out by the Michigan Supreme Court in *Sanford*, has never been overruled. Accordingly, under Michigan law, Don did not possess a separate future interest in the Berwyck Property; therefore, the federal tax lien could not attach to a future interest that did not exist under Michigan law.

IV.

Despite the fact that the tax lien did not attach to the Berwyck Property, there remains an issue of whether a fraudulent conveyance occurred in this case, an issue that the district court did not address. Under Michigan law, one spouse cannot use the doctrine of tenancy by the entirety to defeat the rights of a judgment creditor.

See McCaslin v. Schouten, 294 Mich. 180, 292 N.W. 696, 698 (1940); *Morris v. Wolfe*, 48 Mich. App. 40, 210 N.W.2d 16, 17 (1973). Such a fraudulent transfer can be set aside. *See* Mich. Comp. Laws § 566.19(1).

The issue of whether a fraudulent conveyance occurred in this case is a matter that should be determined by the district court. If the conveyance was fraudulent and therefore set aside, the IRS could be entitled to half the proceeds of the June 1992 sale, or $59,944.10. Accordingly, upon remand, the district court should consider whether the Berwyck Property was transferred for fraudulent purposes.

V.

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment in favor of the United States, in which the district court determined that the United States' tax lien attached to entireties property at the time that Sandra and Don Craft conveyed the property to Sandra, and **REMAND** to the district court for further proceedings in accordance with this opinion.

RYAN, Circuit Judge, concurring.

In my judgment, there can be no doubt that Don Craft had valuable property interests in the 2656 Berwyck Road home and that he ceded those interests for little or no consideration, most likely intending to defeat the IRS lien at issue here. Binding authority, sound reasoning, and equitable principles require that the IRS be awarded *some* portion of the proceeds of the sale of the 2656 Berwyck home if Don Craft paid for entirety property instead of paying his taxes, and then transferred his interest in the property to his wife to avoid the consequences of his tax delinquency. I agree with the majority that summary judgment should not have been granted and that this case should be remanded for further proceedings; however, the remand should be for the sole purpose of determining whether Don Craft's conduct was fraudulent.

I.

The majority relies on *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971), in holding that "a federal tax lien cannot attach to property held as a tenancy by the entirety," and thus that the IRS could have no interest in the Berwyck home. However, binding cases decided since 1971 clearly state a different doctrine: (1) state property law determines which rights, in the bundle of rights we call "property," a person may exercise; (2) an IRS lien attaches to *all* those rights; (3) and state-law "fictions" cannot serve to defeat a valid lien. In this case, Don Craft had a contingent remainder. He had a right to the entire Berwyck property if his wife predeceased him, and he had a right to half the proceeds of the sale or lease of the home if the property were ever sold or leased. Although Don Craft did not have the

whole bundle of property rights, it cannot be denied that he had some of them. And, most assuredly, the IRS could attach these rights.

Pursuant to the Internal Revenue Code, the IRS *must* attach a tax lien to all property or rights to property, real or personal, of any person who neglects or refuses to pay his income tax after demand. *See* 26 U.S.C. § 6321. As the Supreme Court has noted, Congress intended by this provision "to reach every interest in property that a taxpayer might have." *United States v. National Bank of Commerce*, 472 U.S. 713, 720, 105 S. Ct. 2919, 2924, 86 L.Ed.2d 565 (1985). In fact, "'[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.'" *Id.* at 720, 105 S. Ct. at 2924 (citation omitted). Although state law must be relied on in determining what constitutes "property or rights to property" attachable by the IRS, this is hardly surprising considering the fact that there is no federal law of property. *See United States v. Certain Real Property Located at 2525 Leroy Lane*, 910 F.2d 343, 347, 351 (6th Cir. 1990) (*Leroy I*). It also should be no surprise that state-law doctrines that would prevent ordinary creditors from reaching state-defined interests cannot prevent a federal tax lien from attaching. *See United States v. Irvine*, 511 U.S. 224, 240, 114 S. Ct. 1473, 1482, 128 L.Ed.2d 168 (1994); *National Bank of Commerce*, 472 U.S. at 727, 105 S. Ct. at 2927-28; *United States v. Mitchell*, 403 U.S. 190, 205, 91 S. Ct. 1763, 1771-72, 29 L.Ed.2d 406 (1971).

Thus, the first question in this case should be: what state-defined rights, if any, did Don Craft have in the Berwyck property? Under Michigan law, he had the rights to use and enjoy the property in tandem with

Sandra Craft, to exclude all others from the property save Sandra Craft, to share equally in the proceeds of any lease or sale of the home, and to receive the entire estate upon the death of Sandra Craft. *See* Mich. Comp. Laws § 557.71; *Rogers v. Rogers*, 136 Mich. App. 125, 356 N.W.2d 288, 293 (1984). The majority implicitly acknowledges that Don Craft had individual rights when it states that "a husband can convey *his interest* to his wife." (Emphasis added.)

However, it does appear that a federal tax lien only attaches to *exclusive* rights in property held by a delinquent taxpayer. *See* (*Leroy I*), 910 F.2d at 351. In other words, where a delinquent taxpayer cannot exclusively exercise any of the incidents of property ownership, he has nothing to attach. The only rights exclusively held by Don Craft were future interests—the right to share in future proceeds and right of survivorship.

Arguably, Don Craft did not have the right to sell or encumber either of these interests, and therefore did not truly possess anything of value for the IRS to attach. Several Michigan cases state or imply that one spouse has *no* alienable or encumberable interest in entirety property, including future interests. *See Budwit v. Herr*, 339 Mich. 265, 63 N.W.2d 841, 844 (1954); *Zeigen v. Roiser*, 200 Mich. 328, 166 N.W. 886, 890 (1918); *Bauer v. Long*, 147 Mich. 351, 110 N.W. 1059, 1060 (1907); *Tamplin v. Tamplin*, 163 Mich. App. 1, 413 N.W.2d 713, 715 (1987). However, the proposition that a spouse's future interest is inalienable does not appear to have ever been the rule of decision in any case decided by Michigan courts. For instance, in all four cases cited above, the interest at issue was the *present right* to title in the property, not a future interest, and thus

insofar as the language could be read broadly to preclude separate future contingent interests, it is *dicta*. Additionally, even if Michigan law forbids the alienation or encumbrance of one spouse's contingent interest, this merely lessens the *value* of that interest, it does not necessarily make the interest worthless. That is, even an inalienable contingent interest is likely to have some value. Thus, I am not confident that a spouse's future interest in a tenancy by the entirety is truly unencumberable, and even if it is, this still does not mean that the spouse has no valuable interest that may be attached under federal tax law.

This conclusion is required, I think, by *Bank One Ohio Trust Co. v. United States*, 80 F.3d 173 (6th Cir. 1996), which indicates that inalienability is *immaterial* in determining whether a federal tax lien can attach to property rights. There, despite the fact that the Ohio Supreme Court had declared that a trust beneficiary "does not have *any interest* in [a spendthrift trust such as the one in *Bank One*] because the settlor did not give the beneficiary an interest," *Domo v. McCarthy*, 66 Ohio St. 3d 312, 612 N.E.2d 706, 709 (1993) (emphasis added), and despite the fact that the trust was neither alienable or encumberable, this court held that the IRS could attach the income from the trust because the delinquent beneficiary *did* have an interest in the trust despite its inalienability. *Bank One*, 80 F.3d at 176. As we noted:

> R]estraints on alienation are not effective to prevent a federal tax lien from attaching. . . .
>
> . . . Thus when Congress says, as it has done in § 6321, that an unpaid tax "shall" constitute a lien upon "all" of a delinquent taxpayer's property or rights to property, it follows that the tax is a lien both on property that is alienable under state law and on property that is not.

Id.

Similarly, in *Leroy Lane I*, 910 F.2d 343, this court held that, although the federal government could not attach an entirety estate, the government would be entitled to the property if the innocent spouse predeceased the debtor spouse or if the marital estate was otherwise "terminated by dissolution of the marriage or joint conveyance." *Id.* at 351. In effect, then, the government in *Leroy Lane I* had a lien on the debtor spouse's contingent remainder. Thus, regardless whether Don Craft could alienate his contingent remainder pursuant to Michigan law, under federal tax law the IRS lien attached to it in 1989. This future interest was a "right[ ] to property" as defined by Michigan law, and attachable as provided by federal law.

Michigan's legal fictions, revered as they are—that husband and wife are one entity and that neither has any separate interest in a tenancy by the entirety—cannot alter this outcome. As the Supreme Court has made clear, such state-law fictions, while they are perhaps valid defenses against state-law creditors, have no effect on an IRS lien. For example, in *National Bank of Commerce*, the fact that no Arkansas creditor could reach funds of a taxpayer-debtor that were held in a joint account with other nondebtor individuals did not prevent the IRS from attaching the entire account. *See* 472 U.S. at 726, 105 S. Ct. at 2927. The Court determined that the taxpayer's unconditional and unilateral right to withdraw money from the joint bank account

was "property" or a "right[ ] to property" *for purposes of section 6331(a)* of the I.R.C. (a section analogous to 6321). *Id.* at 725-26, 105 S. Ct. at 2926-27. Thus, since the taxpayer could at any time withdraw *all* the money from the account without permission from the joint account holders, the IRS could likewise levy the entire account. Again, state law determines the practical incidents of certain types of ownership, but the state-law consequences of those determinations vis—vis creditors are of no concern in the application of federal tax law. *See id.* at 723, 105 S. Ct. at 2925-26.

Although the majority disagrees, I am satisfied that *United States v. Irvine*, 511 U.S. 224, 114 S. Ct. 1473, 128 L.Ed.2d 168 (1994), also undermines Sandra Craft's position. In *Irvine*, the Court reiterated that legal fictions—although valid protection from creditors under state law—could not be used to avoid federal tax liabilities. There, the taxpayer was the beneficiary of a trust established by her grandfather in 1917. *Id.* at 226, 114 S. Ct. at 1475. The income from the trust was to go to the taxpayer's grandmother and her aunts and uncles (the settlor's wife and children). Upon the death of the last of these primary beneficiaries, the trust was to terminate and the funds were to be divided among the surviving grandchildren, including the taxpayer, Sally Irvine. *Id.* at 227, 114 S. Ct. at 1475-76. After the trust terminated, but before its assets were distributed, Irvine disclaimed her interest in favor of her children. Such disclaimers were valid under state law, and had the effect of removing the disclaiming party from the transaction altogether, *id.* at 239-40, 114 S. Ct. at 1481-82; thus, state law deemed the transfer to be directly from Irvine's grandfather to her children. *Id.*

The I.R.C. section in question taxed "all gratuitous transfers, by whatever means, of *property* and *property rights* of significant value." *Id.* at 233, 114 S. Ct. at 1478 (emphasis added). An exception existed for disclaimed interests in property if the disclaimer was effective under local law and made within a reasonable time after knowledge of the existence of the transfer. *Id.* The IRS claimed that the transfer from Irvine to her children was subject to the gift tax because it was not made within a reasonable time after her knowledge of her interest in the estate. *Id.* at 229, 114 S. Ct. at 1476. The Court held that the 47-year delay in disclaiming her interest was not reasonable, and thus upheld the denial of Irvine's request for a refund. *Id.* at 235-36, 114 S. Ct. at 1479-80.

Significantly, the Court rejected Irvine's argument that her disclaimer related back to the moment of the original transfer of the interest to her as provided by state law. *Id.* at 239, 114 S. Ct. at 1481-82. This "legal fiction" implemented the state's policy to defeat the claims of the disclaimer's creditors. *Id.* at 240, 114 S. Ct. at 1482. However, the state-law rationale for this legal fiction provided no justification vis—vis the federal gift tax, which was meant to curb estate-tax abuse. *Id.* "Since the reasons for defeating a disclaimant's creditors would furnish no reasons for defeating the gift tax as well, . . . Congress [must not have intended] to incorporate state law fictions as touchstones of taxability when it enacted the Act." *Id.*

Nothing in the majority opinion distinguishes *Irvine* or *National Bank of Commerce*. Nor does the majority address cases previously decided by this court, such as *Bavely v. United States (In re Terwilliger's Catering Plus, Inc.)*, 911 F.2d 1168, 1171 (6th Cir. 1990) and

United States v. Safeco Insurance Co., 870 F.2d 338, 341 (6th Cir. 1989), which support the above analysis. Michigan's tenancy by the entirety doctrine serves to protect the marital home from being compromised to satisfy the debts of one spouse. This rationale does not furnish any reason to defeat the federal tax code when the operation of the I.R.C. will not terminate the entirety estate. Although the majority argues that an IRS lien on one spouse's future interest will place a cloud on the title to the marital home, even this would not interfere with the couple's use and enjoyment of their property. And, even if the possible detrimental effect of the IRS lien on the couple's ability to sell their home were an appropriate consideration here, I believe that a properly filed lien, identifying only the delinquent taxpayer's interest and giving no indication of joint liability for the debt, sufficiently mitigates this possibility. Moreover, the adverse effect of allowing a lien on one spouse's future interest is further lessened by the fact that, in Michigan, it appears that creditors may not reach the proceeds of the sale of entirety property if the married couple immediately reinvests the proceeds in new entirety property. *See Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655, 62 N.W.2d 619, 622 (1954).

II.

Thus, on March 30, 1989, when the IRS filed its lien on all of Don Craft's property and rights to property, it acquired a lien on his future interest in the Berwyck home. More importantly, the August 28, 1989, transfer of the property to Sandra Craft did not extinguish the IRS's lien on this contingent remainder. Under Michigan law, one spouse cannot use the doctrine of

tenancy by the entirety to defeat the rights of a judgment creditor. For instance, in *McCaslin v. Schouten*, 294 Mich. 180, 292 N.W. 696, 698 (1940), Mr. Schouten had been adjudged liable to a bank for $10,000. Evidence indicated that he had used $8104 of this money to pay the mortgage on the marital estate. The bank sought a lien on the tenancy by the entirety, because Mr. Schouten was insolvent, and no other means of recovery could be effected. The Michigan Supreme Court granted the lien, reasoning:

> Being insolvent at the time and indebted to the bank, in so far as Mr. Schouten invested or used his individual funds to pay the mortgaged debt on the entireties property and thereby placed or attempted to place his individual property beyond the reach of his creditors, the transaction constituted a fraud in law . . . .
>
> . . . .
>
> . . . The debtor might be satisfied to give his assets to a stranger or to exchange them for some worthless chattel. But the law will not permit him to do so if he thereby renders himself uncollectible to the detriment of his creditors.

Id., 292 N.W. at 699.

The court rejected Mrs. Schouten's contention that her entirety estate should not be disturbed by a forced sale in light of the fact that she was innocent of any fraud, finding that "to so hold would enable her to benefit by Mr. Schouten's wrongful use of his individual funds." *Id.*, 292 N.W. at 700. Thus, the bank was awarded $5504—the amount by which the Schoutens'

equity in the tenancy increased as the result of Mr. Schouten's wrongful use of funds he owed the bank. *Id.*

Similarly, the Michigan Court of Appeals has recently reiterated this holding on essentially the same facts. *See Miller v. Irwin*, 190 Mich.App. 610, 476 N.W.2d 632 (1991). As in *Schouten*, Mr. Irwin failed to satisfy a judgment against him, and the creditor attempted to attach the marital estate of Mr. and Mrs. Irwin. Michigan Compiled Laws § 566.19(1) provides that a creditor may set aside any fraudulent conveyance to the extent necessary to satisfy his claim. The *Miller* court relied on this provision in ruling that mortgage payments on the entirety estate made after the judgment of indebtedness, to the extent that they increased the Irwins' equity in the property, would entitle the creditors—the Millers—to a lien on the property. *Id.*, 476 N.W.2d at 635.

III.

These cases make clear, at least to me, that if the transfer to Sandra Craft was made with the intent to place Don Craft's monies beyond the reach of the IRS, the federal government is entitled to set aside the conveyance and execute its lien. *See* Mich. Comp. Laws § 566.19(1); *McCaslin*, 292 N.W. at 700. However, the critical factual point has not been settled—the district court rested on alternative reasoning and did not need to discuss fraud. However, the facts that Don Craft conveyed his interest shortly after the IRS recorded its lien, that he received only one dollar in consideration for the transfer, and that the grantee was Sandra Craft instead of some disinterested party, are certainly sufficient to raise the inference that the transaction was

fraudulent. *See Farrell v. Paulus*, 309 Mich. 441, 15 N.W.2d 700, 704 (1944).

If the transfer is set aside, then the IRS maintains its lien on Don Craft's future interest. Of course, the property was sold and his future right to half of the proceeds became a present interest in June 1992. I agree with the majority that, if the transfer is set aside, the IRS would be entitled to half of the proceeds of the June 1992 sale, or $59,944.10, plus interest. The fact that the IRS agreed that its interest in the escrowed funds would extend no further than its interest in the home itself is irrelevant. If the transfer to Sandra Craft was fraudulent, *McCaslin v. Schouten* authorizes a forced sale of the marital property. *See* 292 N.W. at 700. If the IRS could force a sale in order to enforce its lien, surely it must be able to take an equal amount when the sale has been consummated without compulsion.

IV.

For the foregoing reasons, I concur in the result reached by the majority only because the summary judgment entered in favor of the IRS must be reversed. The majority opinion, erroneously I believe, denies that Don Craft had a separate, attachable, future interest in the tenancy by the entirety. This holding not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws. Respectfully, we are bound to reject this result.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH THE INTERNAL REVENUE SERVICE, DEFENDANT

[Filed: Mar. 30, 1999]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before: QUIST, District Judge.

Background

Plaintiff, Sandra L. Craft ("Sandra"), filed this action seeking to quiet title to the proceeds of the sale of certain real property located at 2656 Berwyck Road in Grand Rapids, Michigan (the "Berwyck Property"), which Plaintiff had owned with her husband, Don Craft ("Don") as tenants by the entireties. Specifically, Plaintiff alleged that a tax lien filed by the Internal Revenue Service ("IRS" or "Government") for taxes owed by Don did not attach to the Berwyck Property while Sandra and Don owned it as tenants by the entireties or when Don terminated the entireties estate by delivering a quitclaim deed to Sandra on August 28, 1989. Sandra filed a motion for summary judgment on September 10, 1993, in which she argued that the

Government was precluded from maintaining a fraudulent conveyance action on the grounds that Don had been discharged from his debts in bankruptcy. The Government also moved for summary judgment on Sandra's claim, contending that its lien did attach to Don's interest in the Berwyck Property. On September 12, 1994, this Court issued an Opinion and Order denying Sandra's motion for summary judgment and granting the Government's motion for summary judgment on the basis that the IRS's lien attached in the interval of time between Don's termination of the entireties and his conveyance of his interest to Sandra.

On November 17, 1994, the Court issued another Opinion and Order which granted two and denied two of four motions filed by Sandra on September 22, 1994. In particular, the Court granted Sandra's motion to determine the value of Don's interest at the time of the termination of the joint tenancy and her motion for stay of execution of the judgment, and denied her motions to amend the judgment to include its findings supporting denial of her motion on the Government's fraudulent conveyance claim and to refer the case to the bankruptcy court for determination of the value of Don's interest. On October 26, 1995, the Court issued an Opinion and Final Judgment in which it found that the value of Don's interest in the property at the time of the conveyance was $50,293.94.

Sandra appealed the September 12, 1994, Order granting summary judgment in favor of the Government. The Sixth Circuit reversed the Order on the grounds that the lien could not have attached to the entireties interest under Michigan law and that the entireties estate was not "transformed into a tenancy in common as an intermediary step in the conveyance of

the property" to which the lien could have attached. *See Craft v. United States*, 140 F.3d 638, 643-44 (6th Cir. 1998). In addition, the Sixth Circuit held that Don did not possess a separate future interest in the Berwyck Property to which the lien could have attached. *See id.* at 644. Thus, the Sixth Circuit effectively held that Sandra prevailed on her complaint to quiet title. However, the court found that "[d]espite the fact that the tax lien did not attach to the Berwyck Property, there remains an issue of whether a fraudulent conveyance occurred in this case. . . ." *Id.* Accordingly, the court remanded the case for determination of the fraudulent conveyance issue. On December 1, 1998, the Court conducted a bench trial on the fraudulent conveyance issue. The Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) are set forth below.

I. *Findings of Fact*[1]

Sandra and Don purchased the Berwyck Property on May 26, 1972, as tenants by the entireties for $48,000. In connection with the purchase, Don and Sandra obtained a mortgage in the amount of $37,000. Don, a practicing attorney, failed to timely file federal income tax returns for his taxable years 1979 through 1987. As a result, the IRS filed substitute income tax returns for Don pursuant to 26 U.S.C. § 6020(b). In 1988, the IRS assessed Don's tax liabilities in the amount of $482,446.73. On March 30, 1989, the IRS filed a Notice of Federal Tax Lien against all of Don's property with the Register of Deeds for Kent County, Michigan.

[1] Any finding of fact that is a conclusion of law shall be considered as such.

As of April 15, 1980, the date on which the Government's claim for unpaid taxes first accrued, the fair market value of the Berwyck Property was $62,000 and the outstanding balance on the mortgage was $31,628.95, leaving Don and Sandra with net equity in the property of about $31,000. From 1979 to 1985, Don and Sandra made timely payments on their mortgage in the total amount of $19,692, which consisted of $12,999 in interest and $6,693 in principal. As a result, the mortgage balance was reduced to $25,301.05 by January 1, 1986. During the same period, Don and Sandra paid approximately $17,000 in real property taxes. After January 1, 1986, Sandra paid all of the mortgage and tax payments with her own money.

On July 28, 1988, the IRS assessed Don tax for the years 1979 through 1985 in the amount of $168,264.90. The final tax included deductions for all mortgage interest and property tax payments made by Don and Sandra from 1979 to 1985.[2] On March 30, 1989, the IRS

[2] In her response to the Government's post-trial brief, Sandra argued that the Government failed to show that Don was allowed to deduct all mortgage interest and property tax payments because the initial tax figures prepared by IRS Revenue Agent Rosie Wilson ("Wilson"), which substantiated only a portion of the property tax and mortgage interest deductions, were the same as the final assessment. Sandra contends that the lack of difference between the initial and final numbers shows that Don was not allowed any deductions other than those substantiated in the initial figures prepared by Ms. Wilson. However, the fact that a greater amount of property tax or mortgage interest deductions was not substantiated does not mean that those deductions were not taken into account by Ms. Wilson in preparation of the initial figures. Ms. Wilson testified that her work papers containing the initial figures were not complete because she had not completed her investigation. Furthermore, there is no indication that Ms. Wilson did not take into account the entire amount of all claimed deductions at the

filed a Notice of Federal Tax Lien against Don in the amount of $482,446. On August 28, 1989, Don conveyed his interest in the Berwyck Property to Sandra by quit claim deed for the sum of $1.00. During the period of April 15, 1980 through August 28, 1989, Don was insolvent.

Don filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 30, 1992. The bankruptcy court entered an order of discharge on June 1, 1992, and the bankruptcy case was closed on June 11, 1992. In June 1992, the Berwyck Property was sold, yielding net proceeds of $119,888.20, after payment of the mortgage. Pursuant to an agreement between the parties, one-half of the net proceeds were distributed to Sandra, and the balance of the proceeds were deposited into an escrow pending a resolution of the dispute of the IRS lien. Don died on August 17, 1998.

II. *Conclusions of Law*[3]

The issue presented for determination by the Court is whether the conveyance from Don to Sandra on August 28, 1989, constituted a fraudulent conveyance under Michigan's Uniform Fraudulent Conveyance Act ("Fraudulent Conveyance Act"), M.C.L. §§ 566.11 to 566.23. Prior to trial, the Government also raised in its trial brief, for the first time, the issue of whether the conveyance was fraudulent to the extent that Don

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time she prepared her initial figures. Finally, Ms. Wilson testified that Don was allowed to deduct all mortgage and property tax payments and the Government demonstrated that Sandra did not claim any mortgage interest or property tax deductions on her separate returns.

[3] Any conclusion of law that is a finding of fact shall be considered as such.

enhanced the entireties property by paying both the property tax and mortgage payments from 1979 to 1985 while he was insolvent. Apart from her arguments on the merits, Sandra asserts that the Government's claim is not properly before the Court for various reasons. The Court will address these arguments first.

A. Procedural and Limitations Issues

The Government raised its fraudulent conveyance argument as an affirmative defense in its answer to Sandra's complaint. Sandra contends that the Government cannot assert a fraudulent conveyance claim because it has not filed a complaint or a counterclaim. In addition, Sandra contends that the Government cannot now cure this omission by moving to amend its answer to file a counterclaim because the Government was required to assert any such counterclaim in its answer. Sandra also contends that any counterclaim would be barred by the statute of limitations.

Sandra has not cited any authority to support her proposition that when fraudulent conveyance is raised to defeat a quiet title claim it may only be asserted as a counterclaim and not as an affirmative defense. In fact, courts have allowed fraudulent conveyance to be raised as an affirmative defense to quiet title claims. *See, e.g., Snyder v. United States*, No. 88-CV-2136 (RR), 1995 WL 724529, at *13 (E.D.N.Y. July 26, 1995) (denying the plaintiff's motion to strike the Government's affirmative defense of fraudulent conveyance to the plaintiff's quiet title action); *Buffalo Valley Golf Club Partnership v. United States*, No. 2:93-CV-172, 1994 WL 574119, at *2 (E.D. Tenn. July 19, 1994) (finding "no reason why the United States cannot move to set aside a fraudulent conveyance as its affirmative defense to this quiet title action"). Because Sandra has not

offered any persuasive reason why the Government cannot assert fraudulent conveyance as an affirmative defense, the Court finds that the Government has properly pled the issue as an affirmative defense. Consequently, the Government asserted its claim well within any limitations period cited by Sandra because its answer was filed on July 15, 1993.[4]

Even if a fraudulent conveyance argument could only be asserted as a counterclaim to a quiet title action, the Court would still find that the Government is not barred from asserting its claim. Rule 8(c) of the Federal Rules of Civil Procedure provides that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Fed. R. Civ. P. 8(c). "The purpose of Rule 8(c) is to give the opposing party notice of the issue and opportunity to argue his position." *Richmond Steel, Inc. v. Legal & Gen. Assurance Soc'y, Ltd.*, 821 F. Supp. 793, 797 (D. Puerto Rico 1993). In *Richmond Steel*, the court held that the plaintiff

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[4] Because the Court has concluded that the Government's fraudulent conveyance claim was timely asserted within any of the limitations periods at issue, it is unnecessary for the Court to decide the proper limitations period. Nonetheless, the Court concludes that the proper limitations period is the ten year period set forth in 26 U.S.C. § 6502, because "[i]t is well settled that the United States is not bound by state statutes of limitation . . . in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 1020, 84 L.Ed. 1283 (1940); *cf. United States v. Peoples Household Furnishings, Inc.*, 75 F.3d 252, 255-57 (6th Cir. 1996) (holding that the United States was not bound by Michigan's statute of limitations for collection of judgments in suit to enforce judgment on loan where the United States was acting in its sovereign capacity).

complied with Rule 8(c) by raising an affirmative defense to a defendant's counterclaim in its amended complaint, even though the affirmative defense should have been asserted by the plaintiff in its answer to the counterclaim, because the defendant had notice of the defense through the amended complaint, the plaintiff's motion for summary judgment, and the proposed pretrial order. *See id.* The Supreme Court applied Rule 8(c) in *Reiter v. Cooper*, 507 U.S. 258, 113 S. Ct. 1213, 122 L. Ed.2d 604 (1993), where, as Sandra alleges here, the defendants asserted counterclaims as defenses. Citing Rule 8(c), the Court stated, "it makes no difference that petitioners may have mistakenly designated their counterclaims as defenses. . . ." *Id.* at 263, 113 S. Ct. at 1217.

In this case, the Government's assertion of its fraudulent conveyance claim in its answer met the requirements of Rule 8(c). Sandra had ample notice of the claim because the Government asserted it as its first affirmative defense to Sandra's complaint. In addition, Sandra was also on notice of the claim because it was raised as an issue in the parties' motions for summary judgment. Therefore, Sandra's argument must be rejected.[5]

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[5] Although the Government has moved to amend its answer to assert its fraudulent conveyance claim as a counterclaim, the Court finds it unnecessary for the Government to do so because its answer serves the purposes of Rule 8(c). On the other hand, even if the Court concluded that the Government is required to amend its answer to assert a counterclaim, the amendment would relate back to its answer and not be barred by the stat[ut]e of limitations. *See Index Fund, Inc.* v. *Hagopian*, 91 F.R.D. 599, 604 (S.D.N.Y. 1981).

Sandra also argues that the Government may not raise the argument that Don's enhancement of the entireties estate while he was insolvent constituted a fraudulent conveyance because the Government did not raise the issue until shortly before trial. The Court rejects this argument. Although the Government did not raise the specific issue in its affirmative defense, the circumstances under which the issue was presented fall squarely within Fed. R. Civ. P. 15(b), which provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . .

Fed. R. Civ. P. 15(b); *see also Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1030 (6th Cir. 1992); *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982) (noting that an issue raised and argued at trial and upon which evidence was offered was an issue tried by implied consent); *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1069 (6th Cir. 1977) (finding that failure to amend does not affect resolution of an issue, especially where the opposing party did not object at trial regarding the issue).

Rule 15(b) does not require a formal motion to amend the pleadings. *See* Fed. R. Civ. P. 15(b). "All that is required is that the issue be tried by consent, and consent is generally inferred from a failure to object."

Lavean v. Cowels, 835 F. Supp. 375, 383 (W.D. Mich. 1993). While Sandra objects because the Government did not raise the issue until trial, Sandra did not object to the Government raising the issue until after trial. The issue of whether Don was insolvent at the time he made payments which increased the value of the entireties property was set forth in the Joint Final Pretrial Order. Issues 11 through 13 of the controverted issues set forth in paragraph 3 of the Pretrial Order were whether during 1979 through 1985: (i) Don made fraudulent conveyances into the entireties property; (ii) Don contributed approximately $38,000 into the tenancy by the entireties in property tax and mortgage payments; and (iii) Don was insolvent while he was making contributions for the benefit of the entireties. (*See* Joint Final Pretrial Order ¶ 3.) Sandra did not object to the inclusion of these as controverted issues for trial. Moreover, Sandra's counsel did not object at trial to the Government's evidence regarding the amounts contributed by Don to the entireties property from 1979 to 1985. Such evidence could have been relevant only to the Government's contention that Don's payments into the the [sic] entireties from 1979 through 1985 while he was insolvent were fraudulent. Thus, the Court finds that the issue was tried by the implied consent of the parties.

B. Fraudulent Conveyance

The Government contends that Don's August 28, 1989, conveyance of his interest in the Berwyck Property by quit claim deed for one dollar was a fraudulent conveyance under sections 4 and 7 of the Fraudulent Conveyance Act, M.C.L. §§ 566.14, 566.17. Section 4, which applies to conveyances made by debtors without actual intent to defraud, provides:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

M.C.L. § 566.14. Section 7, which requires proof of actual intent, provides:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

M.C.L. § 566.17. Thus, a fraudulent conveyance may be proved either by demonstrating that a conveyance was made by a transferor who was either insolvent at the time or rendered insolvent as a result of the conveyance or that the transferor acted with intent to defraud.

The party seeking to have a conveyance set aside as fraudulent has the burden of producing evidence to support his claim. *See Dean v. Torrence*, 299 Mich. 24, 35, 299 N.W. 793, 797 (1941). Even though transactions between a husband and wife must be closely scrutinized, the party alleging that the conveyance was fraudulent still bears the burden of proof. *See id.*; *Nicholson v. Scott*, 50 F. Supp. 209, 212 (E.D. Mich. 1943). Actual intent to defraud may be shown through "badges of fraud," or "[s]urrounding circumstances which usually accompany an intent to hinder, delay or defraud creditors and from which fraud may be inferred. . . ." *Bentley v. Caille*, 289 Mich. 74, 78, 286 N.W. 163, 164 (1939) (en banc). "Badges of fraud" include lack of consideration, a close relationship between transferor and transferee, pendency or threat of litigation, financial difficulties of the transferor, and retention of possession or control by the transferor. *Coleman-Nichols v. Tixon Corp.*, 203 Mich. App. 645, 660, 513 N.W.2d 441, 449 (1994). Such circumstances are not conclusive evidence of fraud, "but may be strong or weak depending upon their nature and number occurring in the same case." *Id.*

Sandra contends that the Government cannot attack the August 28, 1989, conveyance from Don as a fraudulent conveyance for a number of reasons. The Court will discuss each argument separately.

1. Can the August 28, 1989, Conveyance By Don Of His Interest In Entireties Property To Sandra Be Set Aside As A Fraudulent Conveyance?

Sandra contends that the Government may not attack Don's August 28, 1989, conveyance of his interest in the Berwyck Property to Sandra as fraudulent under the Fraudulent Conveyance Act because a conveyance of property which is exempt from claims of creditors cannot be a fraudulent conveyance under Michigan law. In support of her position, Sandra cites the definition of "assets" under section 1 of the Fraudulent Conveyance Act which provides that "'assets' of a debtor means property not exempt from liability for his debts." M.C.L. § 566.11. Sandra contends that because exempt assets are not considered among a debtor's assets under the Fraudulent Conveyance Act, Don's conveyance of his interest in the Berwyck Property could not be fraudulent. The Government responds that sections 4 and 7 of the Fraudulent Conveyance Act are concerned with a "conveyance" by the debtor without limitation to the debtor's "assets" and that the definition of "assets"

applies solely for the purpose of determining the debtor's insolvency under section 4.

Sandra's argument finds support in numerous cases, decided both before and after Michigan enacted the Fraudulent Conveyance Act, which have consistently held that creditors have no right to complain of a debtor's disposition of exempt property because such property could not be reached to satisfy debts had it remained in the debtor's hands. *See, e.g., Cross v. Commons*, 336 Mich. 665, 669, 59 N.W.2d 41, 43 (1953) (en banc) (holding that the debtor had "the absolute right" to transfer homestead property where the amount of the exemption exceeded his equity in the homestead); *Turner v. Davidson*, 227 Mich. 459, 462, 198 N.W. 886, 887 (1924) (finding that the exchange by the debtor and his wife of one entireties property for another property in the name of the wife was of no concern to creditors because "[t] he uniform rule of this court has been that creditors are not concerned with the disposition which a debtor makes of his exempt property"), *overruled in part by Glazer v. Beer*, 343 Mich. 495, 498-99, 72 N.W.2d 141, 142-43 (1955); *Bresnahan v. Nugent*, 92 Mich. 76, 81, 52 N.W. 735, 736-37 (1892) (observing that "[i]t has been frequently held that a creditor cannot complain of any disposition which a debtor sees fit to make of exempt property"); *Emerson v. Bacon*, 58 Mich. 526, 527, 25 N.W. 503 (1885) (holding that creditors had no right to complain of the debtor's disposition of exempt property); *cf. Baltrusaitis v. Cook*, 174 Mich. App. 180, 185, 435 N.W.2d 417, 419 (1988) (per curiam) (indicating that disclaimer by beneficiary of interest in life insurance proceeds which was exempt from creditors' claims was not a fraudulent conveyance under the Fraudulent

Conveyance Act). Because Don's creditors, including the I.R.S., could not attach Don's interest in the Berwyck Property to satisfy Don's individual debts, *see Craft*, 140 F.3d at 642-43, Don's conveyance of his interest to Sandra could not have constituted a fraud upon his creditors because the property was beyond their reach.

Other cases, without explicitly holding that a spouse's conveyance of an interest in entireties property to the other spouse is not a fraudulent conveyance, support this result. Thus, in *Farrell v. Paulus*, 309 Mich. 441, 15 N.W.2d 700 (1944) (en banc), the court held that the remedy of setting aside a quitclaim deed by a husband to his wife of his interest in entireties property would be ineffective, because it would afford the creditor no relief. The court observed:

> The validity of the quitclaim deed is attacked by plaintiff, but if it were set aside the title would again be in the name of Paulus and wife as tenants by the entirety and plaintiff would not be aided thereby because neither the land nor the rents and profits therefrom would be subject to levy on execution for the sole debt of the husband.

Id. at 445, 15 N.W.2d at 702; *see also Morris v. Wolfe*, 48 Mich. App. 40, 43, 210 N.W.2d 16, 17 (1973) (stating that even if fraud were proven, title to the entireties property would revert to husband and wife and could not be used to satisfy a judgment rendered against only one spouse). Thus, a conveyance cannot be set aside where title would merely revert to husband and wife as tenants by the entireties. Under the facts of this case, title to the Berwyck Property would revert to Don and Sandra as tenants by the entireties and, because Don

predeceased Sandra, sole title would pass to Sandra as the survivor.

The Government cites *Lasich v. Estate of Wickstrom* (*In re Wickstrom*), 113 B.R. 339 (Bankr. W.D. Mich. 1990) as support for its argument that the Court should ignore the so-called "no harm-no foul" rule found in Michigan case law. However, the Court finds *Wickstrom* both factually and legally distinguishable from this case. *Wickstrom* differs on its facts from this case because the conveyances of entireties property in that case were from the debtor and his spouse to the debtor's parents and the debtor's son. *See id.* at 341. While the facts in *Wickstrom* do not materially distinguish the case, the legal issue does. The specific question was whether the bankruptcy trustee could avoid a prepetition transfer of entireties property either as a preference or a fraudulent conveyance pursuant to 11 U.S.C. §§ 547(b) and 548(a). *See id.* at 343. The bankruptcy court rejected the "no harm-no foul" analysis adopted in *Cross* and other Michigan cases because, under the Bankruptcy Code, all property interests of a debtor, including those in entireties property, are included in the bankruptcy estate, whereas such interests were not part of the bankruptcy estate under the Bankruptcy Act of 1898, which governed the court's analysis in *Cross*. *See id.* at 350. Moreover, although the court found that creditors have rights in potentially exempt property, its reasoning was based upon the trustee's right to sell the debtor's interest in entireties property which the debtor fails to exempt. *See id.* at 347. Here, the same considerations do not apply because a bankruptcy trustee is not seeking to recover property under the Bankruptcy Code. Therefore, under Michigan law, the conveyance from

Don to Sandra did not, by itself, constitute a fraudulent conveyance.[6]

Even though the conveyance from Don to Sandra was not fraudulent, the Government may still be entitled to relief. An exception to the "no harm-no foul rule" exists where the debtor, while insolvent, places non-exempt funds beyond the reach of his creditors by enhancing the entireties property. Michigan courts have "consistently held that during insolvency entireties estates cannot be created or enhanced at the expense of creditors and that relief may be granted without reference to any actual fraudulent intent." *Glazer v. Beer*, 343 Mich. 495, 498, 72 N.W.2d 141, 142 (1955) (en banc); *see also La Bour v. Bergin*, 334 Mich. 437, 439, 54 N.W.2d 710, 711 (1952); *Morris*, 48 Mich. App. at 43, 210 N.W.2d at 17. In *McCaslin v. Schouten*, 294 Mich. 180, 292 N.W. 696 (1940) (en banc), the court held that payments made by the debtor while he was insolvent which reduced the balance of his mortgage were fraudulent regardless of actual intent. The court stated:

> Being insolvent at the time and indebted to the bank, in so far as Mr. Schouten invested or used his individual funds to pay the mortgaged debt on the entireties property and thereby placed or attempted to place his individual property beyond the reach of his creditors, the transaction constituted a

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[6] *Ash v. Ash*, 280 Mich. 198, 273 N.W. 446 (1937) (en banc), cited by the Government, only dealt with the question of whether a conveyance of an interest in entireties property by one spouse to the other was procured through fraud. That case does not provide a basis for a creditor of one spouse to attack a conveyance of an entireties interest from one spouse to the other on the basis of fraud.

> fraud in law. Such payment cannot be held proper on the theory that Mr. Schouten was indebted to the mortgagee and had a right to pay that creditor in preference to others. Instead the payment on the mortgage debt was tantamount to an investment of Mr. Schouten's funds in property which he and his wife would hold as tenants by the entireties; and thus he would hinder and possibly prevent his creditors from reaching the funds invested by him. . . .

Id. at 185, 292 N.W. at 699.

The parties have stipulated that Don was insolvent during the period from April 15, 1980 through August 28, 1989, when he was indebted to the I.R.S. for delinquent taxes. In addition, the Government has presented evidence that during this period, Don made property tax and mortgage payments on the Berwyck Property which reduced the principal balance of the mortgage and thereby enhanced the value of the entireties property. Thus, unless otherwise precluded, the Government is entitled to a lien on Don's share of the proceeds of the sale of the Berwyck Property equal to the amount by which the value of the entireties property was enhanced by payments made by Don during the period of insolvency. *See La Bour*, 334 Mich. at 440, 54 N.W.2d at 712.

2. Does Don's Discharge In Bankruptcy Foreclose The Government From Seeking Relief?

Sandra contends that the Government is precluded from asserting a fraudulent conveyance claim because Don's debt was discharged, as was the I.R.S. lien, which the Sixth Circuit has held did not attach to the Berwyck Property. The Government relies on the case

of *Morris v. Wolfe*, 48 Mich. App. 40, 210 N.W.2d 16 (1973), as support for its right to pursue its claim, even after the debt has been discharged in bankruptcy. As Sandra points out, however, *Morris* differs from this case in certain respects. In that case, the plaintiff received a worker's compensation award on January 28, 1963, and a partial summary judgment was entered against the defendant husband in February 1967. An execution on the judgment was issued on December 31, 1969, and notice of levy was recorded on March 4, 1970, against property originally held by the defendants as tenants by the entireties, but which was transferred to the wife when the husband conveyed his interest by quit claim deed on September 23, 1966. The husband then filed a petition in bankruptcy and received a discharge on August 17, 1971. The court held that because the plaintiff was a judgment creditor whose lien had not been affected by the defendant's bankruptcy discharge[7], the plaintiff was not precluded from pursuing fraudulently conveyed property in state court.

> It is fundamental that a discharge in bankruptcy is personal in nature and releases only the bankrupt's personal liability. This discharge affects the underlying debts of secured and unsecured creditors alike but does not dispose of a valid lien not avoided by the bankruptcy act. [F]or this reason, we conclude that a lien creditor may pursue the attached collateral in a state court subsequent to the debtor's discharge in bankruptcy.

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[7] It is unclear from the court's opinion whether the judgment was only against the husband. If that was the case, it seems to this Court that the *Morris* court's conclusion that the lien attached to the entireties property was wrong in light of the Sixth Circuit's holding in this case.

Id. at 45-46, 210 N.W.2d at 18.

Sandra points out that *Morris* does not apply in this case because the Government is not a judgment creditor and its lien did not attach to the Berwyck Property and was therefore discharged. It is true that the *Morris* court drew a distinction between secured and unsecured creditors. *See id.* at 44-45, 210 N.W.2d 16. However, much of the court's discussion was dicta and was also based upon the Bankruptcy Act of 1898, under which fraudulently conveyed property was automatically included in the bankruptcy estate. Although as far as this Court can tell, no Michigan court has addressed the issue, the court in *Dixon v. Bennett*, 72 Md. App. 620, 531 A.2d 1318 (1987), held that a debtor's discharge in bankruptcy did not prevent an unsecured creditor from bringing a subsequent action under the Uniform Fraudulent Conveyance Act. *See id.* at 637-38, 531 A.2d at 1326-27. The court's reasoning explains why *Morris*, to the extent it can be read to preclude claims by unsecured creditors, is incorrect:

> The discharge provision of the Bankruptcy Code, 11 U.S.C. § 524, consistent with fundamental bankruptcy policy, provides the debtor with a fresh start free from the burdens of preexisting liabilities. Under § 524, the discharge only (i) extinguishes personal liability of the debtor; and (ii) prevents creditors whose claims arose pre-bankruptcy from any actions to impose personal liability on the debtor. 11 U.S.C. § 524 (1978). Section 524(e) expressly provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." § 524(e).

Under § 16 of the Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544, 550 (1898), the limitation of discharge provision restricted actions to those against co-debtors, guarantors, or other sureties. The language of § 524(e) of the 1978 Bankruptcy Code reveals a congressional intent to broaden the rights of creditors, by preserving their actions against third parties and their property, and to restrict the effect of a discharge solely to a release of the personal liability of the debtor.

In *Kathy B. Enterprises, Inc. v. United States*, 779 F.2d 1413 (9th Cir. 1986), a debtor fraudulently transferred assets to a third party. The debtor was eventually discharged. Subsequently, the Internal Revenue Service attempted to collect delinquent taxes owed by the debtor by seizing the proceeds the third party was receiving from the sale of the debtor's assets. The I.R.S. claimed that it could collect the taxes in this way because under Illinois law the transfers had been fraudulent. The third party argued that the debtor's discharge barred the I.R.S.'s cause of action. The Court, relying on the change in the statutory language, held that under § 524(e) the I.R.S. could bring a cause of action against a fraudulent transferee despite the debtor/taxpayer's discharge. *Kathy B.*, 779 F.2d at 1415. We agree with the 9th Circuit. In the case sub judice, appellant did not seek to impose personal liability on the debtor but brought her cause of action against the fraudulent transferee. We believe appellant's claim is precisely the type contemplated by the expanded scope of § 524(e).

Id. The holding in *Dixon* has been followed by courts in other states in addressing the same question under those states' versions of the Uniform Fraudulent Conveyance Act. *See Citizens Bank of Mass. v. Callahan*, 38 Mass. App. Ct. 702, 705-06, 653 N.E.2d 600, 602-03; *J.P. Castagna, Inc. v. Castagna*, No. CV 92 0523960, 1995 WL 225473, at *2-3 (Conn. Super. Ct. Apr. 7, 1995) (mem. op.). This Court finds the *Dixon* court's reasoning persuasive and therefore concludes that the Government is not barred from pursuing its claim.

3. Is The Government's Right To Relief Affected By Don's Death?

Sandra argues that Don's death precludes the Government from recovering any of the proceeds of the sale of the Berwyck Property because even if the August 28, 1989, conveyance was set aside, title to the property would revert back to Don and Sandra as tenants by the entireties and, as a result of Don's death, would then go to Sandra as the survivor. While this argument would be applicable if the Court found that the conveyance itself was fraudulent, it does not prevent the Government from recovering the amounts which Don paid to enhance the entireties property while he was insolvent.

4. How Much Is The I.R.S. Entitled To Recover?

The Government asserts that it is entitled to recover all mortgage and property tax payments which Don made from April 15, 1980 through 1985, which enhanced the value of the entireties estate, as well as accretions in Don's share of the net equity, based either upon payments which reduced the mortgage balance or market forces which increased the value of the property. The Government is not seeking to recover

mortgage or property tax payments made after 1985 because those payments were made with Sandra's funds.

The cases cited by the Government do not support its position. The creditors in those cases were allowed to recover only the amount by which value of the equity was increased as a result of payments that somehow put money into the hands of the debtors, either directly or indirectly, and beyond the reach of creditors. For example, in *Dunn v. Minnema*, 323 Mich. 687, 36 N.W.2d 182 (1949) (en banc), the court held that the creditor was entitled to a lien in the amount of $3,305, which represented the total amount of payments on the principal balance of the land contract by the debtor after the date he became insolvent. *See id.* at 696, 36 N.W.2d at 185. In *Glazer*, the court imposed a lien on the entireties property equal to the value of improvements which the debtor used to remodel a barn on the property for use in his business. *See Glazer*, 343 Mich. at 496-97, 72 N.W.2d at 141-42. In *La Bour*, the court awarded the trustee of the defendant's bankruptcy estate a lien in the amount of $2,300, representing payments which the defendant had made to reduce the balance of the mortgage. *See La Bour*, 334 Mich. at 438, 54 N.W.2d at 711. Similarly, in *McCaslin*, the court awarded the creditor a lien in the amount of $5,404, the amount of the defendants' equity in their entireties property. *See McCaslin*, 294 Mich. at 180, 292 N.W. at 700.

To this Court's knowledge, no Michigan court has ever held that the interest component of mortgage payments or property tax payments enhance entireties property to the detriment of creditors. The reason is obvious: such payments do not increase a debtor's

equity or constitute a fraud on creditors. Rather, payments of interest and property taxes are no more than payments made by the debtor to certain creditors in preference over other creditors, which the law allows debtors to do. As anyone who has ever had a thirty-year mortgage can attest, substantial payments in the first several years covering interest, principal, property taxes, and insurance, contribute only slightly in reducing the amount of the debt. Thus, in *Pearce v. Micka*, 62 Md. App. 265, 489 A.2d 48 (1985), the court held "that payment of interest, taxes and insurance premiums did not constitute fraudulent conveyances under the Uniform [Fraudulent Conveyance Act]." *Id.* at 275, 489 A.2d 48. The court in *Pearce* distinguished *McCaslin* on the basis that the payments in "*McCaslin* did not involve monthly mortgage payments which included interest and funds to be escrowed for payment of taxes and insurance premiums."[8] *Id.* at 274, 489 A.2d at 53.

The evidence presented by the Government shows that from 1980 through 1985, Don and Sandra made a total of $19,692 in mortgage payments, which included $12,999 in interest and $6,693 in principal. Thus, during the period in question, payments made using Don's funds reduced the outstanding balance of the mortgage and constituted a fraudulent conveyance in the amount of $6,693. Accordingly, the Government is entitled to $6,693 of the escrowed sales proceeds from the Berwyck Property.

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[8] Likewise, there is no arguable basis for awarding the Government any increase in equity due to the general increase in property values. The value of value of [*sic*] the Berwyck Property would have increased regardless of whether payments were made to reduce the principal balance of the mortgage.

Conclusion

For the foregoing reasons, the Court concludes that the August 28, 1989, conveyance by Don to Sandra of his interest in the Berwyck Property was not a fraudulent conveyance, but that payments made by Don from April 15, 1980 through December 31, 1985, which reduced the principal balance of the mortgage in the amount of $6,693 did constitute a fraudulent conveyance. Therefore, the Government is entitled to recover that amount from the escrowed funds from the sale of the Berwyck Property.

A judgment consistent with these Findings of Fact and Conclusions of Law will be entered.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH
THE INTERNAL REVENUE SERVICE, DEFENDANT

[Filed: Mar. 30, 1999]

JUDGMENT

Before: QUIST, District Judge.

In accordance with the Findings of Fact and Conclusions of Law issued this date,

IT IS HEREBY ORDERED that the United States is awarded $6,693 of the escrowed sales proceeds from the Berwyck Property, plus interest on that amount from October 26, 1995.

IT IS FURTHER ORDERED that the remainder of the escrowed sales proceeds plus interest shall be delivered to the plaintiff.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH
THE INTERNAL REVENUE SERVICE, DEFENDANT

[Filed: Oct. 26, 1995]

OPINION

Before: QUIST, District Judge.

Plaintiff filed this action in an attempt to quiet title to the proceeds from the sale of certain real property. In a prior opinion, this Court held that when Mr. and Mrs. Craft jointly conveyed the property on August 28, 1989, the entireties estate terminated and each spouse took an equal half interest in the estate. The Court must now determine the value of Mr. Craft's interest in the property as of August 28, 1989. The Court held a hearing on September 11, 1995, [1] and subsequently each party submitted a supplemental brief.

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[1] The September 11, 1995, hearing was conducted by telephone.

The parties have stipulated that on August 28, 1989, the Berwyck property had a fair market value of $120,000.00. The parties also agree that on that date the property had an outstanding mortgage balance of $19,412.12. The parties do not, however, agree upon the value of Mr. Craft's interest in the property.

Plaintiff contends that even though the property was not sold in 1989, she should be entitled to deduct the hypothetical transaction costs such as those which were incurred when the property was sold in June of 1992. Plaintiff asserts that Mr. Craft's interest in the property as of August 28, 1989, was $45,682.44.[2] In support of her position, she cites 11 U.S.C. § 506(a) and *In re Claeys*, 81 B.R. 985, 990-91 (Bankr. D.N.D. 1987).

The United States insists that it is entitled to 50% of the net sales proceeds resulting from the June 1992 sale of the property. It argues in the alternative, that if the lien interest is limited to 50% of the value of the property as of August 28, 1989, the United States would be entitled to statutory interest as with a failure to honor levy action under 26 U.S.C. § 6332(d) of the Internal Revenue Code. The United States has attached an exhibit which indicates that the lien interest computed

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[2] Plaintiff's calculation is as follows:

Fair Market Value of real property	$120,000.00
(-) Mortgage balance	19,412.12
(-) Realtor's commission	8,400.00
(-) Survey, termite inspection	215.00
(-) Title insurance	476.00
(-) Transfer tax	132.00
	$ 91,364.88

through June 1, 1992, the month of sale, would total $67,006.85. This amount exceeds the balance of the escrowed fund. Thus, the United States contends that the entire escrowed fund should be awarded to the United States.

This Court is unwilling to accept plaintiff's argument that she be permitted to subtract hypothetical closing costs. Nor is this Court convinced that 26 U.S.C. § 6332(d) is analogous to this fact situation.

Therefore, the Court will determine Mr. Craft's interest in the property as of August 28, 1989, by subtracting the outstanding mortgage from the fair market value of the property and dividing that number by two. This calculation results in the figure $50,293.94.[3] An Order will be entered awarding the United States $50,293.94 of the escrowed sales proceeds. The remainder of the escrowed fund will be released to plaintiff.

FINAL JUDGMENT

In accordance with the Opinion issued on this date,

IT IS HEREBY ORDERED that the United States is awarded $50,293.94 of the escrowed sales proceeds from the Berwyck property.

IT IS FURTHER ORDERED that the remainder of the escrowed fund will be released to the plaintiff.

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[3] Fair Market Value $120,000.00
Outstanding Mortgage - 19,412.12

$100,587.88 ÷ 2 = $50,293.94

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH THE INTERNAL REVENUE SERVICE, DEFENDANT

[Filed: Sept. 12, 1994]

OPINION

Before: QUIST, District Judge.

In this action plaintiff, Sandra L. Craft, seeks to quiet title to proceeds from the sale of certain real property located in Grand Rapids, Michigan. She objects to a lien placed on the property by defendant, the Internal Revenue Service (IRS). This matter is presently before the Court on cross motions for summary judgment.

Background Facts

In May of 1972, plaintiff and her husband, Don R. Craft, purchased the property at issue in this case as tenants by the entireties. Mr. Craft failed to timely file federal income tax returns for taxable years 1979-1987 and as a result, he was assessed $482,446.73 in unpaid tax liabilities. On March 30, 1989, the IRS filed a Notice

of Federal Tax Lien against the property. On August 28, 1989, Don and Sandra Craft quitclaimed their interest in the property to Sandra Craft. Mr. Craft filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 30 1992 and on June 1, 1992, the Bankruptcy Court entered an order of discharge. The bankruptcy case was closed on June 11, 1992.

This lawsuit arose when plaintiff attempted to sell the property and the IRS refused to release its lien. The property was eventually sold and the Crafts entered into an agreement with the IRS whereby one half of the net proceeds of that sale were released to Sandra L. Craft. The balance of the proceeds, amounting to $59,944.10, was retained in escrow pending the outcome of the federal tax lien dispute. The IRS contends that it is entitled to one half of the net proceeds because its lien attached prior to the sale of the property.[1]

DISCUSSION

Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.

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[1] Because the IRS refused to release the tax lien against the property, Sandra Craft moved to reopen the bankruptcy case of Don Craft and file an adversary proceeding against the IRS to force it to release the lien. Although the bankruptcy case was reopened on October 13, 1991, it was subsequently determined that the bankruptcy court did not have jurisdiction to determine the validity of the lien since the property had never been included in Mr. Craft's bankruptcy estate. A Consent Judgment was entered by the bankruptcy court and the bankruptcy case was closed for the second time on June 1, 1993.

R. Civ. P. 56. The rule requires that the disputed facts be material. Material facts are facts which are defined by substantive law and are necessary to apply the law. A dispute over trivial facts which are not necessary in order to apply the substantive law does not prevent the granting of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). The rule also requires the dispute to be genuine. A dispute is genuine if a reasonable jury could return judgment for the nonmoving party. *Id.* This standard requires the non-moving party to present more than a scintilla of evidence to defeat the motion. The summary judgment standard mirrors the standard for a directed verdict. The only difference between the two is procedural. Summary judgment is made based on documentary evidence before trial, and directed verdict is made based on evidence submitted at trial. 477 U.S. at 250-51, 106 S. Ct. at 2511.

A moving party who does not have the burden of proof at trial may properly support a motion for summary judgment by showing the court that there is no evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S. Ct. 2548, 2553-54 (1986). If the motion is so supported, the party opposing the motion must then demonstrate with "concrete evidence" that there is a genuine issue of material fact for trial. *Id.*; *Frank v. D'Ambrosi*, 4 F.3d 1378, 1384 (6th Cir. 1993). The court must draw all inferences in a light most favorable to the non-moving party, but the court may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Agristor Financial Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus.*

Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

Validity of IRS Lien

In *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971), the Sixth Circuit held that, under Michigan law, tenants by the entirety hold under a single title and that a federal tax lien could not attach to property held by a husband and a wife as tenants by the entirety because the government's tax lien was only against the husband. *Id.* at 1343. In this motion, the IRS challenges the continued validity of the ruling in *Cole v. Cardoza*. The IRS contends that subsequent statutory changes and developing case law have made the holding in *Cole v. Cardoza* obsolete. According to the IRS, each spouse now has a separate property interest in a tenancy by the entirety to which a federal lien may attach.

It is well-established that state law governs the question of whether a taxpayer has an interest in property. However, once it has been determined that state law creates a property interest, federal law controls the attachment of a federal tax lien to that property. *United States v. National Bank of Commerce*, 472 U.S. 713, 722, 105 S. Ct. 2919, 2925 (1985); *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132 (1983); *Aquilino v. United States*, 363 U.S. 509, 513-14, 80 S. Ct. 1277, 1280 (1960); *United States v. Bess*, 357 U.S. 51, 55, 78 S. Ct. 1054, 1057 (1958).

In 1975 the Michigan legislature enacted Public Act No. 288. The legislation was an attempt to equalize women's rights in property held as tenants by the entirety. The Act provides that "[a] husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or

personal property held by them as tenants by the entirety." M.C.L.A. 557.71; M.S.A. 26.210(1). The statute became effective December 10, 1975.

Subsequent to this legislation, the Sixth Circuit decided *United States v. Certain Real Property at 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990) *cert. denied sub. nom. Marks v. U.S.*, 499 U.S. 947, 111 S. Ct. 1414 (1991) (*Leroy Lane I*), which concerned the rights of tenants by the entirety in real property the government seized and sold under drug forfeiture proceedings. The Sixth Circuit held that the interest acquired by the government was most analogous to the position of a judgment creditor of one spouse under Michigan law. The court observed as follows:

> The exact nature of the parties' rights would be more readily determinable if the real property here had not been sold. Mrs. Marks would be entitled to live in the house during the duration of the tenancy, and the Government would have a lien on the property to the extent of the value of Mr. Mark's interest which *would prevent Mrs. Marks from obtaining the entire proceeds upon the sale of the property*.
>
> * * *
>
> [A]lthough Michigan law precludes a forced sale of property to enforce a judgment lien, we have found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entireties estate.

Id. at 351-352 (emphasis added).

Two years later, in *United States v. Certain Real Property Located at 2525 Leroy Lane*, 972 F.2d 136 (6th Cir. 1992) (*Leroy Lane II*), the Sixth Circuit restated its *Leroy Lane I* holding as follows: "the government was precluded from obtaining the husband's interest in the property unless [the wife] predeceased her husband *or* unless the entireties estate was otherwise terminated by divorce or *joint conveyance* in accordance with Michigan law." *Leroy Lane II*, 972 F.2d at 137 (emphasis added).

In *Fischre v. United States*, 852 F. Supp. 628 (W.D. Mich. 1994), the District Court for the Western District of Michigan held that judgment lien based upon the sole obligation of one spouse may attach to that spouse's individual survivorship interest in entireties property. In *Fischre*, the plaintiffs, who owned real property as tenants by the entirety, sought to remove a cloud on their title caused by an abstract of a judgment that the United States had obtained against Dr. Fischre individually. Plaintiffs argued that the United States' lien could not attach to Fischre's interest in the property without illegitimately encumbering the property interest of his wife. The court held that the abstract of judgment was void as it pertained to the plaintiffs' present title as tenants by the entirety. However, the abstract of judgment did attach to Dr. Fischre's *individual* survivorship interest in the property and was subject to enforcement upon termination of the entireties estate, whether that occurred by the prior death of Mrs. Fischre, divorce, or joint conveyance. As the *Fischre* court explained, this conclusion does not require a rejection of *Cole v. Cardoza*, but rather a focus on each spouse's potential survivorship interest.

> [E]ven though each spouse has an indivisible interest in the entireties property and owns it as a whole, each also holds an individual interest . . . . This individual interest is not realized and remains inchoate until the entireties estate is terminated by the death of one spouse, divorce or joint conveyance . . . . As long as the entireties estate is intact, the property is not subject to levy and execution by the creditors of one spouse. Yet, each spouse's survivorship interest is distinct, cognizable, and sufficient to support attachment of a creditor's lien.

Id. at 630 (citing *Leroy Lane I*).

In the instant case, plaintiff and Mr. Craft originally held the real property at issue as tenants in the entireties and then made a joint conveyance of the property to Mrs. Craft. At the time that the joint conveyance was made, the entireties estate terminated. At that point, each spouse took an equal half interest in the estate and the government's lien attached to Mr. Craft's interest.

CONCLUSION

For the reasons set forth above, plaintiff's motion for summary judgment is DENIED and defendant's motion for summary judgment is GRANTED. An Order consistent with this Opinion will be entered.

(3)

Supreme Court, U.S.
FILED
AUG 7 2001
OFFICE OF THE CLERK

No. 00-1831

IN THE

Supreme Court of the United States

UNITED STATES of AMERICA, acting through the INTERNAL REVENUE SERVICE,

Petitioner,

v.

SANDRA L. CRAFT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to consider the petition or is the petition by the Internal Revenue Service time-barred?

2. Is the only proper issue on appeal the correct application by the Sixth Circuit of the doctrines of "Law of the Case" and "Law of the Circuit" in the case below?

3. Did the Sixth Circuit correctly decide the issue of tax lien attachment either or both times it ruled on the matter in this case?

4. Whether this case presents issues of sufficiently far-reaching importance for the Court to exercise its certiorari powers?

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JURISDICTION

The Respondent respectfully asserts that this Court does not have jurisdiction to entertain the petition of the Petitioner based on its failure to comply with the terms of 28 U.S.C. § 2101.

The Petitioner makes the same argument before this court as it did in its petition before the Sixth Circuit Court of Appeals unsuccessfully on September 16, 1997. The Sixth Circuit ruled against the Petitioner in its first opinion in this case, *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998) ("*Craft I*") released on April 1, 1998. However, the Petitioner chose not to appeal the adverse ruling of the Sixth Circuit within ninety days as required by statute. *See* 28 U.S.C. § 2101(c).

The requirements 28 U.S.C. § 2101 are mandatory and jurisdictional in nature. *Fed. Election Commsn. v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994), citing *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Failure to comply with the requirements of 28 U.S.C. § 2101 results in this Court not having jurisdiction to entertain the petition before it. *NRA*, 513 U.S. at 99; *Jenkins*, 495 U.S. at 45; *Fed. Trade Commsn. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 207-208 (1952).

The fact that the Sixth Circuit remanded the case back to the District Court for consideration of an entirely different issue, does not alter the finality of the Sixth Circuit's reversal of the earlier District Court's decision on the issue raised by the Petitioner's petition. No argument on the issue of tax lien attachment to tenancy by the entireties real property was heard by the District Court on remand, and the Sixth Circuit refused to allow the IRS to make the same argument to it on appeal for the second time in this case. *Craft v. United States*, 233 F.3d 358, 363, 369, 375 (6th Cir. 2000) ("*Craft II*")

Since there was no change whatsoever, material or otherwise, in the original determination of the Sixth Circuit on the issue of tax lien attachment to tenancy by the entireties property either on remand to the District Court or on appeal to the Sixth Circuit the second time, the IRS had to have filed its petition for writ of certiorari no later than July 29, 1998 for its

petition to have been considered timely under 28 U.S.C. § 2101(c). However, the Petitioner failed to file by that date. The mere fact an earlier judgment is restated or revised in an immaterial way does not toll the time within which review must be sought. *Fed. Trade Commsn. v. Colgate-Palmolive Co.*, 380 U.S. 374, 378 (1965), citing *Fed. Trade Commsn. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-213 (1952) and *Fed. Power Commsn. v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Dept. of Banking v. Pink*, 317 U.S. 264 (1942); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923).

Furthermore, this case is factually different from a procedural standpoint from those cases where this Court has held the Court of Appeals made a material change in the primary or significant issue at stake (*See Zimmern v. United States*, 298 U.S. 167 (1936)), or cleared up a genuine ambiguity when the case came before it a second time (*Idaho Power Co.*, 344 U.S. at 20), thereby allowing a proper petition for writ of certiorari to be filed within ninety days of the release of the second decision by the respective Court of Appeals.

In fact, no change whatsoever has occurred in the Sixth Circuit's single main holding released on April 1, 1998, the IRS chose not to appeal the ruling at that time, the petition for writ of certiorari is therefore not timely under the requirements of 28 U.S.C. § 2101(c), and this Court should reject the petition on the grounds of lack of proper jurisdiction.

CORRECTED STATEMENT OF THE CASE

Both Petitioner's Statement of the Case and its Reasons for Granting the Petition contain numerous misstatements, omissions of fact and introduce factual evidence for the first time throughout its brief. Accordingly, Respondent offers the following clarifications to correct the account of the facts given by the Petitioner for this case.

Paragraph 1.b. of the Petitioner's Statement of the Case discloses the stipulation entered into between the IRS and the Respondent to allow the sale of the home, but fails to indicate that, under the terms of the original stipulation, the escrowed

proceeds would be subject to the same right, title and interest the tax lien had on the property itself. (*See Craft I*, 140 F.3d at 640; Memorandum of Law in Support of United States' Motion for Summary Judgment filed 9/13/93, Summary of Case, page 2, Statement of Fact #12, page 3).

The Petitioner goes on to state in paragraph 3.a. on page 4 while describing the first Sixth Circuit decision in 1998 that, "In reaching that conclusion, the majority relied on the common-law fiction, adopted in Michigan, that property held in a tenancy by the entirety is not owned by either spouse but is instead owned by the 'marital unit' ", and repeats that misstatement again on page 17. Nothing could be more inaccurate. The Sixth Circuit decision in *Craft v. United States*, 233 F.3d 358 (6th Cir. 2000) ("*Craft II*"), which was authored by Judge Guy Cole who also wrote the *Craft I* opinion, specifically rejects that recurring statement by the IRS. ("Indeed, the *Craft I* court rejected the IRS's argument that it was being duped by a state law legal fiction." *Craft II*, 233 F.3d at 368). Despite that inaccurate description being specifically rejected by the Sixth Circuit both times, that phrase permeates the Petitioner's argument throughout this case in an ill-advised attempt to have this Court seize upon that language and conclude that this case is appropriate for review as being contrary to the holding of *United States v. Irvine*, 511 U.S. 224 (1994) which does discuss the principle of state law fictions not precluding the operation of federal tax liens.

While it is part of the Petitioner's later argument, footnote 5 on page 10 of the Petitioner's brief contains factual representations from another case that have never been considered by any lower court in this case. Furthermore, the Petitioner uses those supposed facts to reach a legal conclusion which is patently false. The Petitioner states,

> Instead of paying these taxes, the lawyer used his untaxed income to accumulate equity in four parcels of property that he placed in a tenancy by the entirety.* * *, but the taxpayer's transparent scheme

> to avoid collection appears likely to succeed in the absence of review by this Court of the decision in this case.

However, nothing could be further from the truth. In fact, the exact opposite occurred in this case since a recovery was realized by the IRS. In this case, on remand the District Court held that where mortgage payments by the delinquent taxpayer created additional equity in the tenancy by the entireties real property, the payments fraudulently enhanced the tenancy to the detriment of his creditors including the IRS, and the Court entered a judgment against the escrowed funds in the amount of equity created by those payments. *Craft v. United States*, 65 F. Supp. 2d 651, 658-659, 661-662 (W.D. Mich. 1999); affirmed by *Craft II*, 233 F.3d at 370-371. A denial of certiorari would preserve, if anything, the status quo and would preserve the IRS's current ability to recover equity from the other delinquent taxpayer under the supposed facts alleged, based on the lower court rulings in this case and existing Michigan caselaw.

At footnote 7 on page 11 of the Petitioner's brief, the IRS again attempts to support its argument with representations about factual statistics that have never been entered into evidence nor considered by any court at any level at any time in this case.

The IRS, on pages 12 and 13 of the petition, also improperly restates a statutory definitions argument that was first raised at oral argument on appeal before the Sixth Circuit on August 10, 2000, the second time that Court heard this case.

The Petitioner also ignores prior holdings of the Michigan Supreme Court in defining property rights under Michigan law when it refers to the "right of survivorship". The Michigan Supreme Court, which stands as the Court of last resort in interpreting Michigan common law, held that survivorship is actually an incident of the tenancy, and not a separate property right. *Budwit v. Herr*, 339 Mich. 265, 272-273 (1954); *Sanford v. Bertrau*, 204 Mich. 244, 248-249 (1918).

The IRS petition makes various representations in footnote 16 about the characteristics of tenancies by the entireties in various states, without ever having presented evidence or proof of that information to any lower court in this case. The Petitioner also makes these assertions to this Court without further explaining that even within its subgroup of states that prohibit creditors of one spouse from executing against entireties property, there are varied state law definitions of the tenancy in those states such that a federal tax lien may or may not attach to entireties property in that state.

REASONS FOR DENYING THE WRIT

The Respondent contends that it is unnecessary for this Court to review the two decisions of the Sixth Circuit in the present case since: (1) the Court does not have proper jurisdiction based upon the Petitioner's failure to have filed its petition in accordance with the requirements of 28 U.S.C. § 2101(c); (2) no conflict between the Circuits has been alleged; (3) there are no far-reaching implications or compelling reasons since it has not been previously demonstrated to any lower court that these decisions effect anyone other than Michigan taxpayers; and (4) the well-reasoned opinions of the Sixth Circuit in 1998 and 2000 both correctly set forth the analysis that its decisions do not conflict with any established, controlling precedent by this Court, nor any recent changes in the law.

A. The relief sought by the IRS Petition is time-barred.

This action was originally commenced on April 26, 1993 as an Action to Quiet Title by Plaintiff Sandra Craft against the Internal Revenue Service. After two proceedings in 1994 and 1995 before the U.S. District Court for the Western District of Michigan, the issue presented by the IRS Petition was argued on appeal to the U.S. Sixth Circuit Court of Appeals on September 16, 1997. The opinion and judgment of the Sixth Circuit was released on April 1, 1998 and the IRS filed no Notice of Appeal within the 90-day period to do so after that date. 28 U.S.C. § 2101(c). That opinion reversed the District Court on the issue now presented by the IRS's Petition and only remanded the case back to the District Court for consideration of an entirely different and separate issue. Even the District

Court Judge indicated on remand that the Sixth Circuit had decided with finality the issue of the tax lien of one spouse attaching to tenancy entireties property in Michigan,

> In addition, the Sixth Circuit held that Don did not possess a separate future interest in the Berwyck Property to which the lien could have attached. *See id.* at 644. Thus, the Sixth Circuit effectively held that Sandra prevailed on her complaint to quiet title. However, the court found that "[d]espite the fact that the tax lien did not attach to the Berwyck Property, there remains an issue of whether a fraudulent conveyance occurred in this case. . . ." Accordingly, the Court remanded the case for determination of the fraudulent conveyance issue.

Craft v. United States, 65 F. Supp. 2d 651, 653 (W.D. Mich. 1999).

As indicated by the District Court on remand, the reversal by the Sixth Circuit served as a final adjudication on the merits of the IRS claim by holding that the tax lien of one spouse did not attach to the property while held as tenants by the entirety. No new argument on this issue has been entertained by any court in this case since September 16, 1997.

B. The appeal from the decision of the Sixth Circuit should be limited to the correct application of the "law of the case" and "law of the circuit" doctrines.

"Under the law of the case doctrine, a court ought not reopen issues decided at an earlier point in the same litigation." *See Agostino v. Felton*, 521 U.S. 203, 236 (1997), as cited in *Craft II*, 233 F.3d at 363. As *Craft II* succinctly stated,

> At this juncture, this case is not really about federal tax liens. Nor is it about state law property rights. This case is about the extent to which a prior decision of this court binds a subsequent panel when neither the facts, the parties, nor the law has changed. On appeal, the IRS reasserts its argument that a §6321 federal tax lien against an individual taxpayer

> attaches to a tenancy by the entirety that the taxpayer shares, pursuant to Michigan law, with his spouse. *This is, of course, the very argument we rejected in Craft I.* For the reasons that follow, the government is precluded from re-arguing its case at this time.

(Emphasis added). *Craft II*, 233 F.3d at 363.

With no ability to re-argue the issue, the last court to properly hear the tax lien argument was the Sixth Circuit in 1997, and the IRS did not appeal after the April 1, 1998 decision was released. To allow the IRS to again make its argument after it chose not to appeal in 1998, would be to allow the IRS "to 'panel-shop' and pursue, willy nilly, two or more bites at the apple of settled law." *Craft II*, 233 F.3d at 365.

The law of the case doctrine is designed to insure that, "Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case." *Hanover Insur. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997). *Hanover* set out three alternate grounds for reconsidering a prior ruling in the same case: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Hanover*, 105 F.3d at 312.

On the second Sixth Circuit appeal the Court found that its earlier decision was not clearly erroneous, and therefore never reached the other required part of that ground for reconsideration that the decision would work a manifest injustice. *Craft II*, 233 F.3d at 364-365. The IRS only included one new case which had not been argued before the Sixth Circuit earlier in 1997. The Sixth Circuit rejected the IRS argument that this Court's decision in *Drye v. United States*, 528 U.S. 49 (1999) represented a subsequent contrary view of the law as decided by the controlling authority. *Craft II*, 233 F.3d at 366-369. Despite the District Court conducting an evidentiary hearing in 1999 on remand, the IRS submitted no new evidence whatsoever

to the Sixth Circuit at the second appeal on the issue of federal tax lien attachment to tenancy by the entireties property.

The Sixth Circuit also held that *Craft I* and its predecessor, *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971), constituted law of the circuit and could not be overturned by a subsequent panel. It reached that decision after holding that *Craft I* was not clearly erroneous, and had not been called into doubt by any subsequent decision of this Court. *Craft II*, 233 F.3d at 369.

The law of the case and law of the circuit are principles which, like the jurisdictional restrictions contained in 28 U.S.C. § 2101, are designed to promote the universal principle of all courts that all "litigation must at some definite point be brought to an end." *Minneapolis-Honeywell*, 344 U.S. at 213, citing *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943). Both principles were correctly applied by the Sixth Circuit panel in *Craft II* and should not be disturbed on appeal.

C. The relief being sought by the IRS is barred by the terms of the original escrow stipulation.

The IRS argument throughout this litigation has been that the tax lien attached to some interest of Don Craft prior to the August 28, 1999 Quit-Claim Deed which allowed the lien to remain inchoate until the tenancy was terminated. The IRS has conceded that the binding stipulation between Respondent and the IRS was such that "50% of the net proceeds were retained in escrow subject to the same right, title and interest that the federal tax lien had in the property itself." (Memorandum of Law in Support of United States' Motion for Summary Judgment filed 9/13/93, Summary of Case, page 2, Statement of Fact #12, page 3; *also Craft I*, 140 F.3d at 640).

The language of the stipulation contained in the escrow letter was clear and unequivocal in that it applied to the 50% share of the net proceeds from the earlier sale of the house, which were being escrowed. Therefore, to the extent the IRS tax lien had any validity whatsoever, it would only have attached to those escrowed proceeds and remained so until some future termination of the tenancy by virtue of either a[nother] future conveyance, the couple's divorce, or death of one spouse.

The next development that would terminate the tenancy by the entirety was the death of Don Craft on August 10, 1998. Upon the death of one spouse in a tenancy by the entirety, the surviving spouse owns the property in fee simple absolute, which was the Respondent. (*See* concurrence of Judge Gilman, *Craft II*, 233 F.3d at 378; *United States v. Certain Real Property Located at 2525 Leroy Lane*, ("Leroy Lane I") 972 F.2d 136, 138 (6th Cir. 1992); *Rogers v. Rogers*, 136 Mich. App. 125, 135 (1984)). The original escrow stipulation signed between the parties renders the very relief the IRS seeks moot and is barred by its own specific terms.

D. The Sixth Circuit decision on the issue raised by the IRS's petition was correct in 1998, was correct in 2000, and is correct now.

The IRS's petition is a final attempt to have this Court judicially "occupy the field" by establishing a national common law of real property.

The IRS petition suggests the two decisions of the Sixth Circuit conflict with decisions of this Court. *Drye v. United States*, 528 U.S. 49 (1999); *United States v. Irvine*, 511 U.S. 224 (1994); *United States v. National Bank of Commerce*, 472 U.S. 713 (1985); *United States v. Rodgers*, 461 U.S. 677 (1983) and *Tyler v. United States*, 281 U.S. 497 (1930).

However, the Respondent relies on some of the same Supreme Court cases for the holding that state law determines the nature of legal interest a taxpayer has in property. *Bank of Commerce*, 472 U.S. at 722, citing *Aquilino v. United States*, 363 U.S. 509, 513-514 (1960) and *Morgan v. Commissioner*, 309 U.S. 78, 82 (1940). "Federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *Bank of Commerce*, 472 U.S. at 722, citing *United States v. Bess*, 357 U.S. 51, 55 (1958). Those consequences are then left to Federal law to determine. *Bank of Commerce*, 472 U.S. at 722, citing *Rodgers*, 461 U.S. at 683.

Upon review, it becomes clear that all the cases relied upon by the IRS are either in harmony with the Sixth Circuit decisions,

or are distinguishable. *Tyler* actually reviewed three lower court cases, one relating to stock held as tenants by the entirety in Maryland (something which Michigan does not permit) and two cases concerning real property held as tenants by the entirety in Pennsylvania. *Tyler*, 281 U.S. at 499-500. The distinguishing factor in *Tyler* is that the Court was faced with a tax statute that specifically included tenancy by the entireties interests in a decedent's estate. *Id.* at 500-501. Interestingly, the decision reached by the *Tyler* Court and the underlying basis for it, mirror the result in this case below. Justas the lower Courts in *Craft* have held, the Court in *Tyler* held that it would not allow a tenancy created with the funds of one, to be unfairly shielded from that individual's taxing creditors. *Id* at 501-504. Even as the IRS holds out *Tyler* as an example of a prior decision of this Court finding that state law "fictions" do not prevent the exercise of tax enforcement, that decision repeats the very principle which makes the decisions below correct in this case: "[t]hese decisions establish a state rule of property, by which, of course, this court is bound." *Id* at 501, citing *Warburton v. White*, 176 U.S. 484, 496 (1900).

The petition *United States v. Rodgers* for the proposition that "state-created exemptions" are ineffective against federal tax liens. What that argument fails to recognize is the distinction between state-created exemptions, and state law definitions of property. Even *Rodgers* in its discussion on legislative history and entireties cases stated, "[those cases] do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place." *Rodgers*, 461 U.S. at 702-703 n.31 (1992). Such a statement could not be clearer.

The Respondent asserts that *Bank of Commerce* actually supports her position. While that case includes the quote cited by the IRS petition stating that "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law" *Bank of Commerce*, 472 U.S. at 727, the IRS has been unable to refute the holding that, "the federal statute 'creates no property rights but merely attaches consequences,

federally defined, to rights created under state law.' " *Id.* at 722 (1985), quoting *Bess*, 357 U.S. at 55.

The IRS in its petition cites to the *Irvine* case for the proposition that Federal law is not "struck blind" by state law fictions concerning the ownership of property. In *Irvine*, the Court was faced with a taxpayer who was the beneficiary of a trust created by her grandfather. There was no question in that case that the individual taxpayer owned and possessed a present right or property interest in that trust, at the time it was created. The *Irvine* Court then examined whether a disclaimer of that interest which was valid under Minnesota Law, prevented the Internal Revenue Code from applying its gift tax provisions to the transfer of interest. *Irvine*, 511 U.S. at 229-230.

Such analysis is inapplicable to the facts before the Court in this case. In *Irvine*, the taxpayer owned a present property interest and the Court was ruling on whether or not state law permitting a disclaimer of that interest should be binding on the IRS. In this case, Donald Craft never owned an individual interest in the real property as that property right is defined under Michigan law. The *Irvine* holding regarding the failure of a Minnesota state law allowing a disclaimer of an interest admittedly done to prevent the application of the Internal Revenue Code, contains no precedent on whether the IRS tax lien attached to property in which Donald Craft held no individual interest. The IRS would have this Court believe that *Irvine* allows the federal tax lien to pierce all state law fictions concerning property ownership. What the IRS fails to distinguish is that the state law in *Irvine* dealt with the consequences of that state law fiction, rather than a state law fiction part of the definition of property rights in Michigan.

The petition also forwards the position that *Drye*, 528 U.S. 49 (1999) represents a "subsequent contrary view of the law by a controlling authority." The *Drye* opinion is nothing of the sort. If anything, this Court in *Drye* has provided a "nutshell" summary of all the leading cases prior to *Drye* relating to attachment of federal tax liens and has moved the factors to be considered even more in favor of the Respondent.

The *Drye* Court pointed out that in *Bess* it had previously held, "that no federal tax lien could attach to [insurance] policy proceeds unavailable to the insured in his lifetime." *Drye*, 511 U.S. at 57; citing *Bess*, 357 U.S. at 55-56. The Court also stated, albeit *in dictum*, that it did not "mean to suggest that an expectancy that has pecuniary value and is transferable under state law would fall within § 6321 prior to the time it ripens into a present estate." *Drye*, 511 U.S. at 57 n.7. By those statements, this Court would seem to have once again indicated that a present property interest as defined by state law must exist prior to the attachment of any federal tax lien.

Such language by the Court supports the Sixth Circuit's prior holdings to the effect that the United States, whether through its drug forfeiture statutes or its tax lien statutes, could only proceed against an interest held in the property by the criminal or delinquent taxpayer which remained *after* the tenancy was terminated i.e., when the separate interest of that individual ripened into a present possessory interest. *See Leroy Lane*, 972 F.2d at 138; *Craft*, 140 F.3d at 642.

Even the Court's reiteration in *Drye* of the statement that federal tax law is not struck blind by state law fictions as recited in *Irvine*, 511 U.S. at 240 represents no new change in controlling authority. *Id.* at 53. Furthermore, the *Drye* decision has not changed the law as applied by the lower court holdings in this appeal. The previous holdings of this Court in *Bess*, *Aquilino*, *Bank of Commerce* and *Morgan*, remain the same binding, holdings issued by this Court which have been repeated ad nauseum by the IRS in all its briefs in 1997, in all its briefs in 1999, and now in its petition.

Yet, the IRS in its petition, continues to attempt to have this Court focus solely on caselaw that discusses "property", "rights to property" and the effect of the Internal Revenue Code. What the IRS petition has not set forth is any credible caselaw or statute refuting the voluminous binding precedent which holds that "[s]tate law creates legal interests and right." *Morgan*, 309 at 80; *Aquilino*, 363 at 513; *Bess*, 357 U.S. at 56.

The pronouncement of this Court in *Morgan* was later reiterated by the *Aquilino* Court where it stated,

> The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. In answering that question, both federal and state courts *must look to state law*, for it has long been the rule that "in the application of a federal revenue act, *state law controls* in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute". (Emphasis added).

Aquilino, 363 U.S. at 512-513. Citing *Morgan*, 309 U.S. at 82.

Therefore, the sole question for this Court to decide with respect to the issue of whether the IRS tax lien attached to tenancy by the entireties property in Michigan, is whether Michigan substantive real property law has changed. Voluminous Michigan caselaw representing over 100 years of Michigan decisions have embraced the common law concept of tenancies by the entireties being absolutely and completely immune from the creditors of one spouse, except in cases of fraud. Federal Court decisions interpreting those protections afforded by tenancy by the entireties in Michigan, as well as other states with similar common law, span nearly 50 years. Those Federal decisions uniformly upheld the protections inherent in a tenancy by the entireties until at least 1991.

The IRS has asserted throughout this litigation, that Michigan real property law has changed, or been implicitly changed by this Court's recent rulings. The IRS has been unable, however, to cite to any indication from any of the three bodies legally able to effect such a change, the Michigan Legislature, the Michigan Appellate Courts or the United States Congress.

Michigan law prior to 1991.

"In Michigan Real Property Law, tenancies by the entireties enjoy an ancient and hoary tradition" *Rogers*, 136 Mich. App. at 134. Tenancies by the entirety is a common law creation which has existed in Michigan for over 120 years. The Michigan Supreme Court stated as far back as 1885,

> The interest William Beamer took with his wife was a peculiar one. It was an entirety. *Fisher v. Provin*, 25 Mich. 347 [sic] (1872). They both took the same estate, the same interest, and it could not be separated. The right of the one was the right of the other. Neither could by a separate transfer affect the rights of the other or his own. What would defeat the interest of one would also defeat that of the other. (Cite Omitted) In a portion of these premises the interest of William Beamer was more than that of a joint tenant.

Vinton v. Beamer, 55 Mich. 559, 561 (1885).

The Michigan Supreme Court later clarified some of the distinctions between a tenancy by the entireties and an ordinary joint tenancy in 1891 when it stated, "The estate created by this deed was not an estate in joint tenancy, but an estate in entirety. A joint tenancy implies a seisin *per my et per tout*, while an estate in entirety implies only a seisin *per tout*." *Appeal of Lewis*, 85 Mich. 340, 341 (1891).

Recent Federal case law has explored the concept that each spouse in a tenancy by the entireties holds a separate right of survivorship, distinct to each spouse. Such a judicially-created concept does violence to prior Michigan precedent on that issue. The Michigan Supreme Court released in 1918 the seminal case on tenancy by the entirety in Michigan when it held,

> It is urged by counsel for plaintiffs and appellants that, before the death of either of the parties, each holds an estate similar in some respects to that of a contingent remainder, and that it has been held that a contingent remainder is not subject to execution.

> We think the better doctrine is that the right of survivorship is *merely* an *incident* of an estate by entirety, and does not constitute a remainder, either vested or contingent. *Davis v. Clark*, 26 Ind. 424 (1866); *Shinn v. Shinn*, 42 Kan. 1 (1889). . . .
> Therefore, it has been quite universally held that an estate by the entireties cannot be sold upon execution on a judgment rendered against either the husband or wife, because neither has any separate interest in such an estate. (Emphasis added).

Sanford v. Bertrau, 204 Mich. 244, 248-249 (1918).

The Michigan Supreme Court later emphasized the fictional unity of the husband and wife as one in 1936 when it stated,

> It is conceded the defendants are tenants by the entirety. Neither husband nor wife can sever such tenancy. They do not hold by moieties but by entireties. Neither can alienate a moiety so as to defeat the title to the survivor. Husband and wife take the estate as one person, and they take but one estate. *Palmer v. Treasurer and Receiver General*, 222 Mass. 263, 110 NE 283 (1915).

Nurmi v. Beardsley, 275 Mich. 328, 330 (1936).

That same year the Michigan Supreme Court discussed the scope of tenancy by the entireties characteristics again,

> It is well settled under the law of this State that one tenant by the entirety has no interest separable from the that of the other, has nothing to convey or mortgage or to which he alone can attach a lien. Neither can incumber real estate held as tenants by the entirety without the consent of the other. Each is vested with an entire title and as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title. (6 Michigan Supreme Court citations omitted).

Long v. Earle, 277 Mich. 505, 517 (1936).

The District Court decision below held that, "At the time that the joint conveyance was made, the entireties estate terminated. At that point, each spouse took an equal half interest in the estate and the government's lien attached to Mr. Craft's interest." *Craft v. United States*, 74 A.F.T.R.2d (RIA) 6362.

Such a decision runs directly contrary to previous Michigan case law holding that a conveyance by one spouse in a tenancy by the entireties, to the other spouse constitutes a "release" and such a termination is allowed both by common law and by Michigan statute. MCLA § 557.101.

The Supreme Court reiterated the ability of one spouse to release their interest to the other in 1944 when it held,

> As to the real estate, it satisfactorily appears from the record that this parcel of real estate had been held by John Paulus and his wife Elizabeth for many years as tenants by the entirety and Paulus merely quit-claimed to his wife whatever interest he had therein. 3 Comp. Laws 1929, § 13069 (Stat. Ann. §26.201); *Ash v. Ash*, 280 Mich. 198 (1937). The validity of the quit claim deed is attacked by plaintiff, but if it were set aside the title would again be in the name of Paulus and his wife as tenants by the entirety and plaintiff would not be aided thereby because neither the land nor the rents in profit therefrom would be subject to levy on execution for the sole debt of the husband. *American State Trust Co. of Detroit v. Rosenthal*, 255 Mich. 157 (1931).

Farrell v. Paulus, 309 Mich. 441, 444-445 (1944).

The concept and ability of one spouse terminating his or her interest by releasing it to the remaining spouse was reiterated again in 1952 by the Michigan Supreme Court when it stated, "That the husband might have released his interest to the wife, thereby vesting her with full and complete title, is not open to question, *Ash v. Ash*, 280 Mich. 198, and prior decisions therein cited. CL. 1948 §557.101 (Stat. Ann. §26.201)." *Hearns v. Hearns*, 333 Mich. 423, 433 (1952).

The Michigan Supreme Court again revisited the scope of tenancy by the entireties ownership in 1954 when it held,

> An estate by the entirety is sometimes regarded as a species of, or modified form of, joint tenancy, the modification being rendered necessary by the common-law theory that husband and wife are but one person. The unities of time, title, interest, and possession are common to both estates but in an estate by entirety there is an additional unity, namely, that of person. Strictly speaking, a tenancy by entirety is not a joint tenancy but is a sole tenancy, and, while the 2 estates resemble each other and possess some qualities in common, yet they differ both in form and substance and are distinguishable.

Budwit v. Herr, 339 Mich. 265, 272 (1954).

The *Budwit* court went on to restate the prior holding in *Sanford v. Bertrau*, to the effect that the survivorship aspect of a tenancy by the entireties is merely *incident* to the estate and does not constitute a remainder of any kind, either vested or contingent. *Budwit*, 339 Mich. 272-273.

The IRS took the position in the lower court that Michigan real property law changed with the enactment of Public Act 288 of 1975, now clarified as MCLA § 557.71. That statute was designed to equalize women's rights in, as well as control of tenancy by the entireties property, yet the IRS has taken the position that it has created a separate interest in each spouse in a tenancy by the entireties. Since that law's enactment, however, no Michigan case has construed that statute to reflect such a change. To the contrary, Michigan courts since that time have continued to uphold the long-standing concept of unity of husband and wife as one, with neither spouse holding *any* rights or interest separate from each other. That position was again restated in 1984 by the Michigan Court of Appeals when it held,

> In a true tenancy by the entireties, each spouse is considered to own the whole and, therefore, is

> entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entireties, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. One incident of an estate by the entireties is that the survivor, whether husband or wife, is entitled to the whole and such right cannot be defeated by a conveyance by one spouse to a stranger.

Rogers, 136 Mich. App. at 134-135.

The following year, the Court of Appeals specifically rejected the position taken by the IRS at the lower court. The Court of Appeals ruled on an assertion by a creditor that the enactment of 1975 Public Act 288 legislatively overruled the common-law provision that rents obtained from tenancy by the entireties properties were not subject to garnishment by the creditors of one spouse. That court provided insightful guidance not only as to the effect of the enactment of that statute, but what would be required to change Michigan real property law.

> Plaintiff cites MCL §557.71; MSA §26.210(1), adopted in 1975, for the proposition that the Legislature has overruled the common-law provision that rents from properties by the entireties are not subject to garnishment by one spouse's creditor. That statute provides:
>
> A husband and wife shall be equally entitled to the rents, products, income or profits, and to the control and management of real or personal property held by them as tenants by the entirety.
>
> Again, however, plaintiff cites no cases which have construed the statute in such a way and we decline to do so. The effect of the statute is merely

> to modify the common-law rule that a husband had absolute control over property held by the entireties and the rent derived therefrom. To the extent that the material appended to plaintiff's brief constitutes legislative history, that legislative history does not support plaintiff's interpretation. * * * We cannot read into the statute an intent to extinguish the estate by the entireties or to make an estate by the entireties or its rent subject to garnishment by the creditors of one spouse.
>
> If, as argued by plaintiff, the estate by entireties has outlived its usefulness and should be abolished, it is up to either the Legislature or the Supreme Court to make that determination. The last statements on this issue by the Legislature and by the Supreme Court have recognized the existence of an estate by the entireties. This Court is bound by those determinations.

SNB Bank & Trust v. Kensey, 145 Mich. App. 765, 776-777 (1985).

The last Michigan case that Respondent cites to this Court to is the 1990 Supreme Court decision in *Albro v. Allen*, 434 Mich. 271 (1990). This case is important in that the Michigan Supreme Court specifically discussed joint tenancies with a right of survivorship and the ability of one joint tenant to partition the estate, transfer his or her interest, and do so without effecting a recognized, separate right of survivorship. This case only serves to highlight the difference, by definition and function, between a tenancy by the entireties in Michigan and a joint tenancy with rights of survivorship.

Federal law prior to 1991.

The Federal Court decisions interpreting the protections offered by tenancy by the entireties in Michigan likewise represent a long history of case law upholding the inability of creditors of one spouse from attaching, liening, or executing against tenancy by the entireties property for one spouse's debts.

> While the rule in a number of states is to the contrary, the Supreme Court of Michigan has consistently aligned itself with what appears to be the majority rule to the effect that no portion of an estate by the entireties may be subjected to a lien for the individual indebtedness of either spouse. *Vinton v. Beamer*, 55 Mich. 559 (1885); *Dickey v. Converse*, 117 Mich. 449 (1898); *Schliess v. Thayer*, 170 Mich. 395 (1912); *Turner v. Davidson*, 227 Mich. 459 (1924). . . . In the enforcement of the taxing laws of the United States, the Federal Courts, in determining the extent of a taxpayer's property interest in real estate, are bound by state rules of property. *Poe v. Seaborne*, 282 U.S. 101 (1937).

Shaw v. United States, 94 F. Supp. 245, 246 (W.D. Mich. 1939).

The Sixth Circuit discussed the characteristics of Michigan tenancy by the entireties ownership in a 1940 decision,

> The nature of such estates prevents their sale or disposal, or any part thereof, by either the husband or the wife without the assent of both. The whole remains to the survivor. Neither can convey, *encumber* or at all prejudice such estates without the consent of the other. The unity of the husband and wife as one person and the ownership of the estate by that person prevents the disposition of it otherwise than jointly.

Schram v. Burt, 111 F.2d 557, 561 (6th Cir. 1940).

The *Burt* Court had previously pointed out distinctions which recent decisions seemed to gloss over. "Their genesis lies in the maxim 'man and wife are as one person.' As a consequence of this relationship, many incidences flow therefrom quite different from those arising from a joint tenancy or any other form of co-ownership." *Burt*, 111 F.2d at 561.

The peculiar nature of the protections afforded by a tenancy by the entireties in Michigan was again addressed by U.S. District Court in Michigan when it stated in 1945,

> We find no designation in the Federal Revenue Act by which a tax may be imposed upon property held by the entirety for taxes due from the husband alone. Michigan decisions covering property by entirety follow the common law and have withstood the onslaught of creditors for years. Neither the husband nor the wife has an individual, separable interest in entirety property. Neither can convey an interest without the aid of the other. Neither husband nor wife can sever the tenancy. They take the estate as one person and they take but one estate.

United States v. Nathanson, 60 F. Supp. 193, 194 (E.D. Mich. 1945), citing seven Michigan Supreme Court cases.

The Sixth Circuit again visited the issue of Michigan tenancy by the entireties ownership in 1959 when it stated,

> A tenancy by the entirety in real property is an estate in land accruing to the husband and wife wherein both are seized of the entirety so that neither can dispose of any part without the consent of the other, nor may either subject it to payment of his or her individual debts * * * It is described as "a peculiar and anomalous estate." Each (husband and wife) is seized per tout et non per my; there is but one estate. Whether or not an estate by the entirety has been created in property depends on state law.

Fetter v. United States, 269 F.2d 467, 469 (6th Cir. 1959).

In *Fetter*, the Sixth Circuit went on to cite an earlier U.S. District Court of Michigan decision discussing the characteristics of tenancy by the entireties ownership stating,

> * * * but the *title itself* to the property held by such an estate is not capable of division into separate interests, undivided or otherwise, but is one "entirety," entirely owned by each tenant. There is,

> therefore, in such a tenancy, no title owned by one of such tenants, and no "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him,". . . .

Fetter, 269 F.2d at 470, citing *McMullen v. Zabawski*, 283 F. 552, 556 (E.D. Mich. 1922).

The protections inherent in a tenancy by the entireties in Michigan were central to another decision by the U.S. District Court in Michigan in 1963. That Court held that,

> Under Michigan law, neither the husband nor the wife has an individual, separate interest in entirety property, *United States v. Nathanson*, supra; *Long v. Earle*, supra; *Vinton v. Beamer*, supra; and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. *Schram v. Burt*, supra; *French v. Foster*, 307 Mich. 361 (1943); *Arrand v. Graham*, 297 Mich. 559 (1941); *Long v. Earle*, supra; *Hearns v. Hearns*, supra; *Schulz v. Silver*, 323 Mich. 454 (1949). One incident of an estate by the entirety is that the survivor, whether husband or wife, is entitled to the whole, and such right cannot be defeated by a conveyance by one spouse to a stranger." *Guldager v. United States*, 204 F.2d. 487 (6th. Cir. 1953); *Lilly v. Schmock*, 297 Mich. 513 (1941); *Detroit & Security Trust Co. v. Kramer*, 247 Mich. 468 (1929).

McLean v. United States, 224 F. Supp. 726, 728-729 (E.D. Mich. 1963).

The Sixth Circuit then issued the seminal opinion of *Cole v. Cardoza* in 1971. That case, simply put, is "on all fours" with the present case. Just as in Mrs. Craft's case, the *Cole* Court was called upon to determine whether a federal tax lien filed only against the husband based on taxes owed by the husband alone, could attach against tenancy by the entireties property owned in Michigan. Unless the IRS can demonstrate

that Michigan substantive real property law has changed, the only difference between the *Cole* case and that of Mrs. Craft, is the dates and the names, at least as to the issue of whether the tax lien attached at the moment it was filed by the IRS.

Based on the duplication of facts between *Cole* and that of Sandra Craft during the tenancy by the entireties, it is important to revisit the language of the Sixth Circuit concerning the attachment of a Federal tax lien to tenancy by entireties:

> This issue involves two questions. Does the Federal tax lien attach to the above named property? If not, does it constitute a cloud on the title to the property such that the appellants are entitled to have it removed? In answering both questions, we look to the law of Michigan which governs the property rights of the taxpayers. *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *Aquilino v. United States*, 363 U.S. 509 (1960).
>
> The Government concedes that under Michigan law it has no valid claim against the home of the appellants. *Shaw v. United States*, 94 F.Supp. 245 (W.D. Mich. 1939); see *United States v. Nathanson*, 60 F.Supp. 193 (E.D. Mich. 1945). In Michigan tenants by the entirety hold under a single title. Neither spouse has the power without the concurrence of the other to alienate the estate or any interest therein, and neither the land nor the rents and profits therefrom are subject to levy or execution for the sole debts of the husband. *Farrell v. Paulus*, 309 Mich. 441, 445 (1944). Thus, in the present situation, the federal tax lien *does not attach* to the subject property owned by Eugene and Mary Cole by the entirety, because the Government's tax lien is against

> Eugene Cole only. If the lien constitutes a cloud on the title to that property, appellants are therefore entitled to have the lien declared a nullity as to the property. (Emphasis added).

Cole v. Cardoza, 441 F.2d 1337, 1343 (6th Cir. 1971).

The ruling of the Sixth Circuit is pristinely clear and remarkably applicable to Ms. Craft's case. The tax lien for Donald Craft only did **not** attach to tenancy by the entireties property in Michigan prior to the termination of the tenancy.

The Sixth Circuit again discussed tenancy by the entireties protections in 1985. The Court decided a case dealing with the converse of whether a creditor of one spouse could reach entireties property, that is, whether joint creditors of both spouses could reach tenancy by the entireties property. The Sixth Circuit reiterated previous positions dealing with the peculiar characteristics of tenancy of the entireties property.

> Michigan is among the minority of states retaining the common law tenancy by the entirety. Tenants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property. See *Sanford v. Bertrau*, 204 Mich. 244 (1918).
>
> * * * Under Michigan law, ordinary creditors cannot reach interests in entireties property, and the entire interest will therefore be exempt if there are no joint creditors. Joint creditors, however, can reach the entireties interest, subject only to the $3,500 homestead exemption in Mich.. Const. art. 10, § 3."

In the Matter of Grosslight (*Liberty State Bank and Trust v. Grosslight*), 757 F.2d. 773, 775-776 (6th Cir. 1985).

The Sixth Circuit again had the opportunity to revisit tenancy by the entireties ownership in Michigan in the very case that the Internal Revenue Service asserts stands for the

proposition that Michigan law concerning tenancy by the entireties contains a separate right of survivorship in each spouse, which therefore can be attached by the Federal tax lien. Such a position, however, directly contradicts the clear and unequivocal language of the Sixth Circuit in that case.

> Under Michigan law, entireties property may be levied upon by the State for nonpayment of real estate taxes on the real property itself. See *Robbins v. Barron*, 32 Mich. 36 (1875). However, entireties property may not be attached to satisfy the personal tax liability of a single spouse. *Cole v. Cardoza*, 441 F.2d at 1343; *United States v. Nathanson*, 60 F.Supp. 193 (E. D. Mich. 1945).

Leroy Lane I, 910 F.2d at 350.

The Sixth Circuit again revisited its treatment of tenancy by the entireties property when that same case came before at a second time in 1992. The Court stated at that time that the Government was precluded from obtaining the husband's interest in the tenancy by the entireties property, unless the wife predeceased him, there was a divorce, or the entireties estate was jointly conveyed and that the Government's interest in the property was most analogous to the position of a judgment creditor under Michigan law. *Leroy Lane II*, 972 F.2d at 137 The Court went on to clarify its previous ruling:

> The government argues that by virtue of the federal forfeiture statute and our prior opinion in this case, they stepped into Mitchell Marks' place and therefore, should receive one-half of the property. We disagree. As we stated in our prior opinion, the federal forfeiture statutes do not operate to destroy the fundamental characteristics given to real property by the states. See *Certain Real Property*, 910 F.2d 349. To allow the United States to step into Mitchell Marks' place as a tenant by the entirety would destroy the tenancy by the entirety because the unities of time, title, and person would be violated.

> The government did not and could not possess Mitchell Marks' present interest in the tenancy by the entirety. The government's interest comes into being only when the tenancy by the entireties is destroyed either by death, divorce, or operation of Michigan law. When the tenancy by the entireties is destroyed, the government gets whatever Mitchell Marks possesses after the entireties estate is destroyed. In this case, by virtue of the divorce court's distribution of the property, Mitchell was left with no part of the property.

Leroy Lane II, 972 F.2d at 138.

Specifically, what the Sixth Circuit did not state was that the Government possessed Mitchell Marks' right to survivorship by virtue of the application of the drug of forfeiture statute, a statute which unquestionably provides the United States with greater and more far reaching powers against an individual's property than does the Internal Revenue Code. What the Sixth Circuit did state was that the Government could only get whatever interest the husband possessed *after* the entireties estate was destroyed. Just as in the *Leroy Lane* cases, after the tenancy by the entireties was destroyed, the husband here was left with no part of or claim to the property. In *Leroy Lane*, however, the Sixth Circuit was concerned that the United States had not been afforded the opportunity to represent its claim to an interest in that entireties estate before the divorce court.

In the present case, however, the IRS not only had actual notice of Don Craft's Chapter 7 bankruptcy, but was actively involved in an adversary proceeding in that bankruptcy on the exact issue before this Court. Further, the IRS was actively negotiating an escrow agreement which allowed the sale of the property held as tenancy by the entireties to be closed in June of 1992, pending discussions and/or litigation between the parties as to the attachment of the tax lien. The IRS could have pursued their rights to claim an interest in this property held as

tenants by the entirety during Don Craft's bankruptcy. The IRS chose not to do that and instead relied on its assertion that its tax lien against Don Craft alone attached to his interest in the tenancy by the entireties property despite that position being contrary to all relevant case law.

What has Changed?

Voluminous Michigan precedent for more than 100 years, as well as a significant number of Federal cases addressing Michigan tenancy by the entireties, clearly stand for the proposition that neither tenant in an entireties estate owns or possesses any separate right, including a right to survivorship, that is capable of being alienated, transferred, levied, garnished upon, or subjected to a creditor's lien. The question then becomes what has changed in Michigan real property law to support the Petitioner's argument?

The Respondent would answer unequivocally, "Nothing!" Given the fact that tenancy by the entireties is a common-law creation of Michigan real property law, there are three entities that properly have the power and authority to change what is current law in Michigan. The first would be the Michigan legislature by simply deciding that the concept of tenancy by the entireties needs to be codified, or in the alternative, has outlived its usefulness and some statute needs to be passed to replace or reject or eliminate that concept. The second entity which could change tenancy by the entireties law is the Michigan Appellate Court system. Either the Michigan Court of Appeals or the Michigan Supreme Court could, by its rulings change, modify or outright eliminate tenancy by the entireties in Michigan. The last entity which legally could change the concept of tenancy by the entireties ownership in Michigan would be the United States Congress by amending any number of Federal statutes and specifically modifying or eliminating the protections afforded by tenancy by the entireties ownership.

Absent some indication by one of those three entities that the substantive real property law concept of tenancy by the

entireties ownership has changed, it is inappropriate for a Federal Court to determine that substantive Michigan real property law should be changed, altered or eliminated.

The Michigan legislature has not taken any action specifically or impliedly to change, alter or eliminate those protections encompassed by tenancy by the entireties ownership which are at issue in this case. The position taken at trial by the IRS was that 1975 Public Act 288 created a separate interest in each spouse. That is simply an incorrect statement of the law and has been rejected by the Michigan Court of Appeals in *SNB Bank & Trust*, 145 Mich. App. 765, as discussed above.

The Michigan Appellate courts have likewise not indicated by their rulings, any change in the protections afforded by tenancy by the entireties ownership since that statute in 1975, or since this Court's 1971 *Cole v. Cardoza* ruling. To the contrary, the rulings of *Rogers* in 1984, *SNB Bank & Trust* in 1985, *Tamplin v. Tamplin* in 1987 and *Albro v. Allen* in 1990 represent a continuing pattern of cases upholding the continued vitality of tenancy by the entireties protections in Michigan.

Lastly, the United States Congress could pass various legislation which would modify, curtail or eliminate those protections afforded spouses in Michigan under tenancy by the entireties ownership. Section 522(b)(2)(B) of Title 11, the Bankruptcy Code separate specifically provides for the continuing recognition of the status provided by tenancy by the entireties ownership. Congress could have eliminated such a protection from its exemption scheme for Federal bankruptcy purposes, but instead has continued to recognize that concept through at least five significant reforms and amendments.

The Respondent respectfully asserts that none of the three entities properly able to change the concept of tenancy by the entireties ownership in Michigan have done so and that this Court should therefore deny Petitioner's petition for certiorari.

E. This case does not have such far-reaching implications or compelling reasons as to merit granting certiorari to review multiple decisions of the Sixth Circuit.

There is no conflict between the Circuits that would suggest a need for this Court to grant certiorari on the issue presented in the petition. The IRS has not offered, much less demonstrated at any lower court, that this decision affects the residents of any other State other than taxpayers in the State of Michigan.

The Petitioner would have this Court believe this case has far-reaching implications of a most compelling nature because of what it believes is the creation of an "easy avenue for tax avoidance". The IRS defers attention from the fact that this case only reaffirms the long-standing legal holding and principle of *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971). Despite no less than three evidentiary hearings before the District Court in this case, the IRS has never presented any factual evidence whatsoever of another taxpayer, even in Michigan, who has availed themself of this supposedly "easy avenue for tax avoidance" despite this legal principle being the status quo in federal court in Michigan for a minimum of sixty years, and in Michigan courts for over 100 years.

The IRS continues throughout this litigation to make representations to the Court about facts not in evidence. Now for the first time the IRS would have this Court consider what it states without any support, to be statistics concerning the effects of tenancy by the entireties on married taxpayers' delinquency rates in Michigan. (Petitioner's brief, n.7, p. 11)

The Petition continues with an additional argument concerning the Michigan statutory definitions of joint tenancies, and the alleged future interests included therein (Petition, pp. 12-13), repeating an argument made for the first time at oral argument before the Sixth Circuit on August 10, 2000. It is black-letter law that a party cannot raise an argument for the first time on appeal and the IRS should be barred from making its argument over the statutory definitions of joint ownership

for failing to raise it at any prior trial. *Helvering v. Wood*, 309 U.S. 344, 349 (1940); *Burnet v. Commonwealth Improvement Co.*, 287 U.S. 415, 418 (1932).

The Petition continues to represent to the Court that certiorari should be granted because the decisions of the Sixth Circuit conflict with controlling decisions of this Court. That very argument was rejected by the Sixth Circuit no less than four times, twice by vote of the entire panel of judges on the Sixth Circuit.[1] As discussed in the preceding section, that recurring statement by the IRS reflects analysis and conclusions that are simply inaccurate and misleading.

The well-reasoned decisions of the Sixth Circuit Court of Appeals correctly apply the controlling precedent of this Court with respect to the issue of state law property rights. This Court should not disturb the Court of Appeals' findings which are not in any manner repugnant to any prior holding of this Court.

CONCLUSION

The petition for writ of certiorari should be dismissed or denied as unnecessary for the all reasons stated above.

Respectfully submitted,

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1. The Sixth Circuit rejected that exact argument by the IRS in the *Craft I* decision released on April 1, 1998; it rejected that argument again as part of the *unanimous* vote to deny a petition for hearing *en banc* in December, 1999; it rejected that argument again at oral argument and as indicated in the *Craft II* decision released on November 22, 2000; and it rejected that argument for a fourth time by majority vote of the judges on the Court in denying a petition for rehearing *en banc* on March 16, 2001.

Supreme Court, U.S.
FILED
AUG 23 2001

No. 00-1831

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Respondent errs in asserting (Br. in Opp. 1-2) that the United States may not obtain review of the final judgment entered in this case because that judgment rests, in part, on the interlocutory order entered by the court of appeals on the first appeal in this case. Respondent claims that "[t]he fact that [on the first appeal] the Sixth Circuit remanded the case back to the District Court for consideration of an entirely different issue, does not alter the finality of the Sixth Circuit's reversal of the earlier District Court's decision on the issue raised by the Petitioner's petition." *Id.* at 1.

In making that contention, respondent ignores the settled rule that "the Court on certiorari to review a final decree can reach back and correct errors in the interlocutory proceedings below, even though no attempt was made to secure review of the interlocutory

decree or even though such an attempt was made without success." R. Stern, E. Gressman et al., *Supreme Court Practice* 40 (7th ed. 1993), citing, *e.g.*, *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1964); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923). Indeed, it is the Court's "normal practice" to deny "interlocutory review." *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting).[1] Review by writ of certiorari is ordinarily from the final order that disposes of all issues in the case rather than "from an interlocutory order." *American Construction Co.* v. *Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893).[2]

On the first appeal in the present case, the Sixth Circuit did not address or resolve the question whether the Crafts had fraudulently conveyed the property to respondent. Instead, the court of appeals remanded the case for consideration of this issue by the district court. Pet. App. 3a, 58a. On remand, the district court held that the property had not been fraudulently conveyed

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[1] See also *Columbia Union College* v. *Clarke*, 527 U.S. 1013, 1015 (1999) (Thomas, J., dissenting from the denial of certiorari) ("the Court declines to grant certiorari today—perhaps because this case comes to us in an interlocutory posture"); *Randolph Central School Dist.* v. *Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting from the denial of certiorari).

[2] The cases on which respondent seeks to rely (Br. in Opp. 2) are inapposite. For example, *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-213 (1952), addresses whether the 90-day period for the filing of a petition for a writ of certiorari may be renewed when, without the filing of a petition for rehearing, the court of appeals issues a second opinion on a single appeal. That question is not presented here. Similarly, this case does not present the question addressed in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378 (1965), concerning the circumstances in which a *final* order in prior litigation may be reviewed in connection with a separate but related later suit.

to respondent but concluded that the government could recover the amounts by which Don Craft had enhanced the value of the property during his insolvency by making mortgage payments. *Id.* at 79a-86a. On the government's appeal from the judgment entered on remand, the court of appeals declined to reconsider its rulings on the first appeal and affirmed the district court's ruling on the fraudulent enhancement issue. *Id.* at 6a-20a. The petition for a writ of certiorari is timely because it was filed by the United States within 90 days of the judgment entered by the court of appeals following the proceedings on remand. See Pet. 1.

2. Respondent errs in asserting (Br. in Opp. 8-9) that this case became moot upon the death of Don Craft in 1998. Respondent contends that, upon her husband's death, respondent obtained fee simple title to the property by right of survivorship and is therefore entitled to the sale proceeds that have been held in escrow pending the conclusion of this case. Respondent argues that this conclusion is required both by general principles of succession and by "[t]he original escrow stipulation signed between the parties" (*id.* at 9).

(i) The escrow agreement to which respondent refers was formed at the time of the sale of the subject property, and it specifies that one-half of the proceeds were to be released to respondent (representing "her share" of the proceeds) and that "[t]he remaining one-half, or $59,944.10 will be placed in an interest bearing account at [respondent's counsel's law firm] until such time as a resolution of the tax lien dispute is reached and an agreement is signed by both the Internal Revenue Service and representatives of Don Craft or until ordered to release those funds by an appropriate court order." C.A. App. 147. Nothing in that escrow

agreement addresses or resolves the proper disposition of these funds upon the death of Don Craft.

(ii) The correct disposition of these escrowed funds can be determined only upon resolution of the question presented in this case. If, as the government submits, the federal tax lien attached to the interest of Don Craft in the tenancy-by-entirety property, that lien attached to his interest in the proceeds of that property upon its sale—a sale that occurred six years *prior* to his death. Pet. App. 3a. That sale terminated the tenancy-by-entirety and, upon its termination, each of the tenants became individually entitled to receive one-half of the proceeds. Mich. Comp. Laws Ann. § 557.71 (West 1988); see *Rogers* v. *Rogers*, 136 Mich. App. 125, 135, 356 N.W.2d 288, 293 (1984). See also Pet. 12.[3] The valuable and legally protected right of each member of a tenancy by the entirety to share as individuals in the proceeds of the sale is one of the "rights to property" to which the federal tax lien attaches by operation of law under 26 U.S.C. 6321. *United States* v. *National Bank of Commerce*, 472 U.S. 713, 725 (1985) (the "right to receive property is itself a property right" to which the federal tax lien attaches). See Pet. 11-15.

As Judge Ryan explained in his separate opinion below, before the property was sold, the federal lien had attached to Don Craft's "future right to half of the proceeds." Pet. App. 69a. And, when the property was thereafter sold, the taxpayer's "future right to half of

[3] Even under state law, the proceeds of entirety property that are available for meeting personal expenses may be attached for the debts of one spouse. See *Muskegon Lumber & Fuel Co.* v. *Johnson*, 338 Mich. 655, 62 N.W.2d 619 (1954); *In re Wickstrom*, 113 B.R. 339, 349 (Bankr. W.D. Mich. 1990); *In re Jackson*, 92 B.R. 211, 214 (W.D. Mich. 1988); *In re Jones*, 31 B.R. 372, 375 n.4 (Bankr. E.D. Mich. 1983).

the proceeds became a present interest" to which the federal lien continued to attach. *Ibid.* Because the death of Don Craft occurred many years *after* the tax lien had attached to his separate interest in the proceeds, and because these proceeds were not themselves entirety-property, his death does not make the government's claim for enforcement of its lien moot. See, *e.g.*, *United States* v. *Rodgers*, 461 U.S. 677, 691 n.16 (1983) (the federal tax lien "cannot be extinguished * * * simply by a transfer or conveyance of the interest").[4]

3. a. Respondent principally contends on the merits (Br. in Opp. 9) that the federal tax lien can attach only to interests that the State has itself characterized as "property." It is well established, however, that whether or not the State characterizes the interest as "property" is not controlling. Instead, courts are to look to "federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye* v. *United States*, 528 U.S. 49, 58 (1999). Because the governing question of statutory

[4] Indeed, in the district court, respondent took the position that the tenancy by the entirety had been terminated even *prior* to the sale, when the property was quitclaimed by Don Craft to respondent in 1989. Pet. App. 3a. Respondent maintained in the district court that "[t]he tenancy by the entireties in the case before the Court was destroyed by operation of law when the tenancy was terminated in accordance with the provisions of MCLA § 557.101 as shown on Government Exhibit 3." C.A. App. 204-205. Of course, the conveyance of property to which the federal tax lien has attached does not destroy the lien, for the lien passes with the property and also attaches to any proceeds. See, *e.g.*, *Drye* v. *United States*, 528 U.S. 49, 53-54 (1999); *United States* v. *Rodgers*, 461 U.S. at 691 n.16; *United States* v. *Bess*, 357 U.S. 51, 57 (1958) (property subject to a federal lien can only be passed "cum onere").

interpretation is controlled by federal law, "it is not material that the economic benefit to which the [taxpayer's] right pertains is not characterized as 'property' by local law." *Id.* at 58 n.5 (quoting W. Plumb, *Federal Tax Liens* 27 (3d ed. 1972)).

As demonstrated in the petition (Pet. 12-13), the spouse's interest in a tenancy by the entirety in Michigan is a valuable, legally protected "species of right or interest" to which the federal tax lien attaches. *Drye* v. *United States*, 528 U.S. at 56. Under Michigan law, each spouse has the right to reside on the property, to exclude third parties from the property, to join or refuse to join in the mortgage, lease or sale of the property, and to share individually in the proceeds of a sale. See *Farmers' & Merchants' Nat'l Bank & Trust Co.* v. *Globe Indemnity Co.*, 264 Mich. 395, 399, 249 N.W. 882, 883 (1933); *Eadus* v. *Hunter*, 249 Mich. 190, 193-196, 228 N.W. 782, 783-784 (1930); Mich. Comp. Laws. Ann. § 557.71 (West 1988). Each spouse also has the right of survivorship, which is the right to receive the property in fee simple absolute upon the death of the other spouse. See *Rogers* v. *Rogers*, 136 Mich. App. at 135 n.14, 356 N.W.2d at 293 n.14; Mich. Comp. Laws. Ann. § 554.872(g) (West Supp. 1997), recodified at Mich. Comp. Laws Ann. § 700.2901(g) (West Supp. 2001).[5]

[5] The Michigan legislature has specified that a tenancy by the entirety "consist[s] of a present interest and a future interest" and has itself characterized each of these interests as "property." Mich. Comp. Laws. Ann. § 554.872(g), (i) (West. Supp. 1997), recodified at *id.* § 700.2901(g), (i) (West. Supp. 2001). The Michigan Supreme Court has accordingly held that each spouse holding entirety property has "a significant interest in property" protected by the Due Process Clause. *Dow* v. *State*, 396 Mich. 192, 204, 240 N.W.2d 450, 456 (1976).

Recent Michigan legislation makes it even more apparent that each spouse's interest in entirety property constitutes an interest in "property" or a "right to property" that is subject to the federal tax lien. Prior to 1975, the husband had exclusive control of the property and enjoyment of its income and profits. In 1975, however, the legislature amended state law to specify that the two spouses are equally entitled to the control and management of entirety property and to its rents, income, and profits. Mich. Comp. Laws. Ann. § 557.71 (West 1988). See *Dow* v. *State*, 396 Mich. at 198 n.10, 240 N.W.2d at 453 n.10.

These state-created rights, which are protected by law and have undeniable value, constitute "property or rights to property" within the broad scope of the federal tax lien. See *Drye* v. *United States*, 528 U.S. at 56; Pet. 11-13.

b. Respondent is wrong in suggesting that a State may avoid the consequences of federal tax law simply by adopting a "state law fiction [as] part of the definition of property rights" (Br. in Opp. 11). It is well established that federal tax law—and the operation of the federal tax lien in particular—is not governed by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59. Federal tax law looks to "the actual results" rather than "the artificial rules" of state law in determining the nature and taxability of rights possessed by tenants by the entirety. *Tyler* v. *United States*, 281 U.S. 497, 503 (1930). See Pet. 17-20.

c. Respondent also errs in suggesting (Br. in Opp. 28) that the general exemption from creditors for entireties property under the Bankruptcy Code (11 U.S.C. 522(b)(2)(B)) reflects an intention of Congress that the federal tax lien should not be understood to

reach such property. In fact, this provision clearly reflects precisely the opposite conclusion. The statute describes the interest of each spouse in a tenancy by the entirety as a "property" right and specifies that, notwithstanding any discharge in bankruptcy, such property remains subject to any "tax lien, notice of which is properly filed." 11 U.S.C. 522(c)(2)(B). Respondent's contention that the federal tax lien does not attach to entirety property is plainly inconsistent with, and would simply nullify, this carefully crafted statutory provision.

4. As Judge Ryan emphasized in dissent, the majority opinion in this case "not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws." Pet. App. 69a. Under the reasoning of the decision below, one or both spouses may earn income, fail to file returns or file only separate returns, and immunize unlimited amounts of entirety property from tax collection. Indeed, a prominent Michigan lawyer has pursued precisely such a path in accruing federal tax debts in excess of $8,000,000 while "sheltering" his assets in several tenancies by the entirety.[6] See *Hatchett* v. *IRS*, 126 F. Supp. 2d 1038, 1047, 1050-1051 (E.D. Mich. 2000), appeal docketed, No.

[6] There is no basis for respondent's suggestion (Br. in Opp. 4) that the "fraudulent enhancement" theory (see Pet. App. 85a-86a) will enable the government to collect the tax liabilities of other taxpayers who have employed tenancies by the entirety to avoid payment of taxes. The fraudulent enhancement theory allows recovery only of nonexempt funds that an insolvent debtor has used to enhance the value of exempt property during the period after the lien arose. *Ibid.* In this case, recovery under this theory was limited to the funds ($6,693) that Don Craft had used to reduce mortgage principal. *Id.* at 92a. The outstanding tax liability, with interest, however, exceeds $482,446. *Id.* at 45a.

00-1645 (6th Cir. June 13, 2000). Review of the important and recurring question presented in this case is needed to close the "ready pathway for tax avoidance" sanctioned by the decision below. S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 888 (1995).

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

THEODORE B. OLSON
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AUGUST 2001

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NOV 9 2001
CLERK

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QUESTION PRESENTED

Whether the federal tax lien that arises by operation of law in "all property and rights to property" of a delinquent taxpayer (26 U.S.C. 6321) attaches to the rights of that taxpayer in property held in a tenancy by the entirety.

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In the Supreme Court of the United States

No. 00-1831

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-41a, 44a-69a) are reported at 140 F.3d 638 and 233 F.3d 358. The opinions of the district court (Pet. App. 70a-93a, 95a-104a) are reported at 74 A.F.T.R.2d (RIA) 6362, 76 A.F.T.R.2d (RIA) 7447, and 65 F. Supp. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2000. Pet. App. 42a. The petition for rehearing was denied on March 16, 2001. Pet. App. 43a. The petition for a writ of certiorari was filed on June 8, 2001, and was granted on September 25, 2001. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 6321 of the Internal Revenue Code, 26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

STATEMENT

1. a. Although Don Craft earned substantial income from his law practice during the years 1979 through 1986, he failed to file federal income tax returns for each of those years. Pet. App. 45a, 72a. In 1988, the Internal Revenue Service assessed $482,446 in unpaid income tax liabilities owed by him for those years and demanded payment. *Id.* at 45a. When Mr. Craft failed to pay these taxes on demand, the federal tax lien attached by operation of law to "all property and rights to property" in which he owned any interest. 26 U.S.C. 6321. Notice of the federal tax lien was filed on March 30, 1989, in the county of his residence. Pet. App. 45a.

b. Sandra L. Craft was the wife of Don Craft and is the respondent in this case. In 1972, Don and Sandra Craft purchased real property in Grand Rapids, Michigan, as tenants by the entirety. Pet. App. 45a. On August 28, 1989, after the notice of tax lien had been filed for the taxes owed by Don Craft, the Crafts jointly executed a quitclaim deed that purported to transfer this property solely to Sandra Craft for one dollar. *Id.* at 45a. When she thereafter attempted to sell the property in 1992, a title search revealed the government's lien. The Internal Revenue Service agreed to release the tax lien from this property so that the sale could be made, with the stipulation that half of the net proceeds—amounting to $59,944.10—were to be held in escrow pending a final determination of the rights of the parties.[1]

2. Sandra Craft then brought this action to quiet title to the escrowed proceeds. The government asserted in its answer (i) that the federal tax lien attached to Don Craft's interest in the property when it was held by the Crafts as tenants by the entirety, (ii) that when the property was conveyed to respondent it remained subject to the government's lien and (iii) that the government is therefore entitled to one-half of the sale proceeds. The government further asserted that Don and Sandra Craft's purported conveyance of the property to Sandra Craft was invalid as a fraud on creditors. Pet. App. 46a-47a.

The district court granted the government's motion for summary judgment. The court held (i) that the conveyance of the property to respondent terminated the tenancy by the entirety, (ii) that, at that moment, each spouse took an equal one-half interest in the estate and (iii) that the government's lien attached to Don Craft's one-half interest in the estate at that time and remained attached to the property throughout any subsequent transfers. Pet. App. 104a. The court con-

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[1] Under the escrow agreement, the funds representing Don Craft's 50% share of the sale proceeds are held "in an interest-bearing account * * * until such time as a resolution of the tax lien dispute is reached and an agreement is signed by both the Internal Revenue Service and representatives of Don Craft or until ordered to release those funds by an appropriate court order." J.A. 30.

cluded, however, that the tax lien attached only to the value of Don Craft's interest as of the date of the Crafts' conveyance of the property to respondent and not to any appreciation of that property's value that occurred subsequent to that date. *Id.* at 46a-48a, 104a.

3. a. Both parties appealed. Pet. App. 44a. On respondent's appeal, the Sixth Circuit reversed the determination of the district court that the tax lien attached to the property.[2] Relying on that circuit's earlier decision in *Cole* v. *Cardoza*, 441 F.2d 1337 (1971), the panel majority held that Don Craft never had an attachable interest in the property held in a tenancy by the entirety—either prior to, or at the transitory moment of, the conveyance to respondent. Pet. App. 54a-56a. In reaching that conclusion, the majority relied on the common-law fiction, adopted in Michigan, that property held in a tenancy by the entirety is not owned by either of the spouses but is instead owned by the "marital unit." The court concluded that the husband (who owed the taxes) had no separate interest in entirety property to which the tax lien could attach. *Ibid.* Since Michigan law exempts property held in a tenancy by the entirety from seizure by creditors for the debts of only one spouse, the majority concluded that this property was exempt from the federal tax lien for the separate tax debt of one spouse. *Id.* at 57a-58a.

According to the panel majority, the decisions of this Court in *United States* v. *Irvine*, 511 U.S. 224 (1994), and *United States* v. *Rodgers*, 461 U.S. 677 (1983), have no effect "on the government's ability to attach a lien to

[2] As a result of that ruling, the court of appeals did not consider the government's appeal of the district court's determination that the tax liens did not attach to any appreciation occurring after the Crafts' conveyance of the property to respondent.

an entireties estate, because these cases do not alter the basic tenet that state law governs the issue of whether any property interests exist in the first place." Pet. App. 55a. The court remanded the case for consideration of the fraudulent conveyance issue that had not been addressed by the district court. *Id.* at 58a.

b. Judge Ryan concurred in the remand but dissented from the majority's conclusion that a spouse's interest in entirety property is not "property or rights to property" to which the federal tax lien may attach. Pet. App. 69a. He concluded that each spouse has valuable, legally-protected rights in property held in a tenancy by the entirety to which the tax lien attaches as a matter of federal law: in particular, each spouse has the right to share in the proceeds of any sale or lease of the property and the right to the entire property if the other spouse predeceases him. *Id.* at 61a. Judge Ryan added that this Court's decisions in *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), and *United States* v. *Irvine*, *supra*, make it clear that the state legal fiction that the husband and wife are a single entity—and the associated fiction that neither has any separate interest in entirety property—cannot be interposed to preclude the operation of the federal lien (Pet. App. 63a-64a):

> As the Supreme Court has made clear, such state-law fictions, while they are perhaps valid defenses against state-law creditors, have no effect on an IRS lien. For example, in *National Bank of Commerce*, the fact that no Arkansas creditor could reach funds of a taxpayer-debtor that were held in a joint account with other nondebtor individuals did not prevent the IRS from attaching the entire account.
> * * *

> Although the majority disagrees, I am satisfied that *United States* v. *Irvine*, 511 U.S. 224 (1994), also undermines Sandra Craft's position. In *Irvine*, the Court reiterated that legal fictions—although valid protection from creditors under state law—could not be used to avoid federal tax liabilities.

Judge Ryan noted, moreover, that the majority opinion "not only contravenes established precedent," it also "provides an avenue for easy avoidance of federal income-tax laws." *Id.* at 69a.[3]

4. On remand, the district court concluded that when, as here, property is made exempt from the claims of creditors under state law, a conveyance of that property cannot be a fraudulent transfer under state law. Pet. App. 79a-85a. The court stated, however, that this rule is inapplicable when the debtor, while insolvent, places non-exempt funds beyond the reach of his creditors by using them to enhance exempt property. *Id.* at 85a-86a. Since Don Craft had enhanced the value of the property by making mortgage payments while he was insolvent, the court held that the government is entitled to a lien on his share of the sale proceeds to the extent of the enhanced value—which the court concluded was $6693. *Id.* at 86a, 92a.[4]

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[3] Judge Ryan was of the view that the federal tax lien would not follow the property after its transfer to respondent unless that transfer was set aside as fraudulent. See Pet. App. 69a. He concurred in the remand solely for the purpose of determining whether Don and Sandra Craft's transfer of the property for $1 to Sandra Craft as sole owner constituted a fraud on creditors. *Id.* at 68a-69a.

[4] This figure included only the portion of the mortgage payments that had been applied to reduce the principal balance of the loan. The district court rejected the government's additional claim to recover the far greater interest payments, as well as local ad valorem property tax payments, that Don Craft made over the years with the untaxed income that generated the tax liability in the first place. Pet. App. 92a-93a.

5. Both parties again appealed. Pet. App. 1a-2a. The government also petitioned the court of appeals for hearing *en banc* on the ground that the decision in *Craft I* conflicted with the relevant decisions of this Court. The court of appeals denied that petition in December 1999. Pet. App. 6a.

a. The panel to which the appeal was assigned concluded that it was bound by the prior decision in *Craft I* and dismissed the government's appeal.[5] Pet. App. 2a. The panel stated that it was bound by *Craft I* because the relevant Supreme Court decisions do not "directly h[o]ld otherwise" (*id.* at 11a) and because the recent decision of this Court in *Drye* v. *United States*, 528 U.S. 49 (1999), which was issued after *Craft I* was decided, "has not so fundamentally changed the legal landscape as to overrule *Craft I*." Pet. App. 18a.

b. In a concurring opinion, Judge Gilman agreed that the panel was bound by *Craft I* but concluded "that the result reached in *Craft I* and that this court endorses today, is inconsistent with Supreme Court precedent and should be reversed." Pet. App. 35a. Judge Gilman therefore recommended "that this case be revisited en banc." *Ibid.*

Judge Gilman stated that the decision in *Craft I* was inconsistent with the decisions of this Court that make clear that the federal tax laws are "not struck blind" by state-law legal fictions. Pet. App. 36a (quoting *United*

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[5] On respondent's appeal, the panel affirmed the district court's ruling that the government is entitled to a lien on the property to the extent of taxpayer's payments of the principal of the outstanding mortgage loan made after the taxes began to accrue. Pet. App. 20a-23a.

States v. *Irvine*, 511 U.S. at 240). Judge Gilman stated that (Pet. App. 38a):

> [i]n contravention of *Irvine*, the majority in *Craft I* failed to look past Michigan's characterization of an individual's interest in entireties property and ignored the substantial rights actually held by Don Craft, which similarly had undeniable value. In other words, I believe that the majority in *Craft I* was "struck blind" by Michigan's "legal fictions."

Judge Gilman noted that each spouse has several valuable, legally-protected rights in entirety property to which the federal tax lien may attach: (i) the right to enter and enjoy the property and to exclude all others; (ii) the right to half of any rental or sale proceeds; (iii) a contingent right of survivorship; and (iv) in the event of divorce, the right to bring an action for partition and sale. Pet. App. 37a-38a. Because these valuable rights are protected under state law, "*Craft I* reached the wrong result, and the IRS ought to have had the right to attach Don Craft's valuable interest in the tenancy by the entirety." *Id.* at 38a. Although Judge Gilman believed the panel was bound by *Craft I*, he recommended that the case be reheard en banc because "*Craft I* contravenes recent Supreme Court decisions." *Id.* at 41a.

c. Following the entry of the panel decision, the government filed a petition for rehearing *en banc*. That petition was denied when "less than a majority of the judges" of that circuit voted to grant it. Pet. App. 43a.

SUMMARY OF ARGUMENT

1. Under Section 6321 of the Internal Revenue Code, the federal tax lien attaches by operation of law to "all property and rights to property" of a delinquent taxpayer. 26 U.S.C. 6321. This statutory lien is broad in scope and "reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 720 (1985). As this Court recently concluded, this expansive federal tax lien "reach[es] every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. 49, 56 (1999).

The interest of a married taxpayer in property held in a tenancy by the entirety is a valuable, legally protected "species of right or interest" that is encompassed within the federal tax lien. Each spouse has the right to use the property, to receive half the proceeds of the sale of the property, or to receive the property in fee simple absolute on the death of the other spouse. Because these legally-protected rights have "undeniable value" (Pet. App. 38a (Gilman, J.)), they constitute "property" or "rights to property" within the broad scope of the federal tax lien. *Drye* v. *United States*, 528 U.S. at 56.

2. a. The court of appeals erred in concluding that "state law governs the issue of whether any property interests exist in the first place" (Pet. App. 55a). It is federal law, not state law, that "determine[s] whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye* v. *United States*, 528 U.S. at 58. "Once it has been determined that state law creates sufficient interests in the taxpayer to satisfy

the requirements of the statute, state law is inoperative, and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 722 (1985).

b. Under the established federal standard, the valuable, legally-protected rights of each spouse in entirety property constitutes an interest in "property" or "rights to property" to which the federal lien attaches. The fact that state law may, in some circumstances, preclude other creditors from seizing or foreclosing on property held in a tenancy by the entirety does not prevent the attachment and enforcement of the federal tax lien. As this Court emphasized in *United States* v. *Rodgers*, 461 U.S. 677, 701 (1983), "state-created exemptions against forced sale" of jointly-owned property are ineffective against the federal tax lien. It is "irrelevant" to the enforcement of the federal tax lien that state law prohibits other creditors from foreclosing on property held in a tenancy by the entirety. *United States* v. *National Bank of Commerce*, 472 U.S. at 727.

c. The court of appeals erred in relying on the legal fiction employed in Michigan that entirety property is owned by the marital unit rather than by the individual spouses acting collectively. Federal tax statutes are not "struck blind" by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59; *United States* v. *Irvine*, 511 U.S. 224, 240 (1994). In particular, in applying federal tax statutes affecting tenancies by the entirety, courts are to look to the "actual" substantive rights of the spouses rather than to the "amiable fiction" of state law that such property is owned by the "marital unit" rather than by the spouses collectively. *Tyler* v. *United States*, 281 U.S. 497, 503 (1930).

3. The contrary holding of the court of appeals would cause an irrationally disparate treatment of similarly situated taxpayers. A tenancy by the entirety is the *only* form of joint property ownership that has been treated as exempt from the federal tax lien for the debts of one spouse. Other types of joint ownership—such as homestead property, community property, and jointly-owned property—have consistently been held subject to the federal tax lien. The decision of the court of appeals would create an unwarranted preference for taxpayers who own property in a tenancy by the entirety over taxpayers who jointly own property in the many States that do not recognize, or have abolished, that form of ownership.

The decision of the court of appeals also fails the test of common sense, for it "provides an avenue for easy avoidance of federal income-tax laws." Pet. App. 69a (Ryan, J.). Under the court's reasoning, both spouses may earn income, refuse to file returns or file only separate returns, and avoid paying taxes simply by shielding their residence—and, in many States, even their bank accounts and other financial assets—in a tenancy by the entirety. It is implausible to conclude that, in crafting the broad text of the federal tax lien statute for the very purpose of "assur[ing] the collection of taxes" (*Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945)), Congress intended to authorize such an obvious and facile method for evading and obstructing tax collection.

ARGUMENT

THE FEDERAL TAX LIEN ATTACHES TO THE RIGHTS OF A TAXPAYER IN PROPERTY HELD IN A TENANCY BY THE ENTIRETY

A. A Spouse's Interest In A Tenancy By The Entirety Is A Valuable, Legally Protected Interest That Is Subject To The Federal Tax Lien

1. When a taxpayer fails to pay taxes after a demand for payment has been made, a lien arises by operation of law "in favor of the United States upon all property and rights to property" of that taxpayer. 26 U.S.C. 6321. "[T]he purpose of the federal tax lien [is] to insure prompt and certain collection of taxes due the United States from tax delinquents." *United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 51 (1950). To achieve that goal, Congress employed the broadest terminology "to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 720 (1985). Indeed, "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945). Recognizing the sweeping text and purpose of Section 6321, this Court has recently held that this broad federal tax lien "reach[es] every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. 49, 56 (1999). See also *Jewett* v. *Commissioner*, 455 U.S. 305, 309 (1982) (quoting S. Rep. No. 665, 72d Cong., 1st Sess. Pt. 1, at 39 (1932); H.R. Rep. No. 708, 72d Cong., 1st Sess. 27 (1932)).

The term "property" is "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right or interest * * *." *Black's Law Dictionary* 1382 (rev. 4th ed. 1968). The "property" or "rights to property" to which the federal tax lien attaches thus includes interests as diverse as "unliquidated choses in action, contingent remainders, options, alimony, the taxpayer's interest in jointly owned property, business licenses, the cash surrender value of life insurance, and property exempt under state law." 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.6.4, at 111-158 (1989). See also *Drye* v. *United States*, 528 U.S. at 61 (an heir's right to inherit is "property" under Section 6321); *United States* v. *National Bank of Commerce*, 472 U.S. at 723-727 (a depositor's right to withdraw the entire contents of a joint bank account qualifies as "property" under Section 6321); *United States* v. *Bess*, 357 U.S. at 56-57 (an insured's right under a life insurance policy to compel his insurer to pay him the cash surrender value is "property" subject to the tax lien).

2. No less than an heir's right to inherit, the interest of a married taxpayer in a tenancy by the entirety is a valuable, legally protected "species of right or interest" (*Drye* v. *United States*, 528 U.S. at 56) and is therefore encompassed within the federal tax lien. During the period of a tenancy by the entirety, each spouse has separate rights in the present use of the property and in its disposition upon the termination of the tenancy by sale, death or divorce. For example, in Michigan, "joint property"—a category that includes a tenancy by the entirety in real or personal property —"consist[s] of a present interest and a future interest." Mich. Comp. Laws Ann. § 554.872(g), (i) (West Supp. 1997), recodified at *id.* § 700.2901(g), (i) (West Supp. 2001).

The "present interest" entitles each spouse to reside on the property, to exclude third parties from the property, to share in the profits of the property, to join or refuse to join in the mortgage, lease, or sale of the property and, upon the sale, individually to receive half the proceeds. *Id.* § 557.71 (West 1988); see *Rogers* v. *Rogers*, 136 Mich. App. 125, 135, 356 N.W.2d 288, 293 (1984); *Farmers' & Merchants' Nat'l Bank & Trust Co.* v. *Globe Indem. Co.*, 264 Mich. 395, 399, 249 N.W. 882, 883 (1933); *Eadus* v. *Hunter*, 249 Mich. 190, 193-196, 228 N.W. 782, 783-784 (1930). In addition, if a married couple divorces, each spouse becomes a tenant in common of realty formerly owned by the entirety, unless the divorce decree provides otherwise. Mich. Comp. Laws Ann. § 552.102 (West 1998 & Supp. 2001). The "future interest" in a tenancy by the entirety "is the right of survivorship," which is the right to receive the property in fee simple absolute upon the death of the other spouse. *Id.* § 554.872(g) (West Supp. 1997), recodified at *id.* § 700.2901(g) (West Supp. 2001). These valuable interests are expressly described as "property" rights under state law (*id.* § 700.2901(i)), and the Michigan Supreme Court has held that each spouse holding an interest in a tenancy by the entirety has "a significant interest in property" that is protected by the Due Process Clause of the United States Constitution. *Dow* v. *State*, 396 Mich. 192, 204, 240 N.W.2d 450, 456 (Mich. 1976).

These valuable rights of each spouse in a tenancy by the entirety qualify as "property" or "rights to property" under the broad text of the tax lien statute.[6] The

[6] The imposition of a federal tax lien on entirety property does not, by itself, divest the "marital estate" from possession. The primary effect of a lien is to ensure that such property remains potentially available for payment of delinquent taxes and cannot be transferred free of the government's claim in the interim. Moreover, as this Court emphasized in *United States* v. *Rodgers*, 461 U.S. at 696, the government's lien reaches only the taxpayer's interest in property. If the government seeks to sell the property to enforce its lien under 26 U.S.C. 7403, the court may deny foreclosure in "the exercise of reasoned discretion." 461 U.S. at 706. And, if a sale is authorized, the non-liable spouse must be compensated for her interest "according to the findings of the court in respect to the interests of the parties and of the United States." *Id.* at 697-698 (quoting 26 U.S.C. 7403(c)).

right of each spouse "to exclude others" from property held in a tenancy by the entirety is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan* v. *Tigard*, 512 U.S. 374, 384 (1994). Similarly, each spouse's right to "possess, use and dispose" of the property, in concert with the other, is a characteristic attribute of a "property" right. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). And, each spouse has the right to receive half of the proceeds of a sale or to receive the fee simple absolute upon the death of the other. These legally-protected rights have undeniable value and therefore constitute "property or rights to property within the broad scope of the federal tax lien. *Drye* v. *United States*, 528 U.S. at 56.[7]

[7] The valuable, legally-protected rights of a taxpayer in entirety property are at least as extensive as the right of an heir-at-law to inherit under Arkansas law—a right to which the federal tax lien attached under this Court's decision in *Drye* v. *United States*, 528 U.S. at 59-60.

B. The Court Of Appeals Erred In Concluding That State Law Governs In Determining Whether A Spouse's Interest In A Tenancy By The Entirety Is Subject To The Federal Tax Lien

The court of appeals erred by relying (Pet. App. 51a-53a) on its decision in in *Cole* v. *Cardoza*, 441 F.2d 1337 (1971), and in failing to follow the recent, clear guidance of this Court in *Drye* v. *United States*, *supra*.

1. The rationale of *Cole* v. *Cardoza*, 441 F.2d at 1343, is that state law "governs the property rights of the taxpayers" and that courts must therefore "look to the law of" the State in determining whether "the federal tax lien attach[es] to the * * * property." The court concluded that, since "tenants by the entirety hold under a single title" under Michigan law, the federal tax lien cannot attach to the property for the debts of one spouse only. *Ibid.* In the present case, the court of appeals repeated the reasoning of *Cole* by relying on what it described as "the basic tenet that state law governs the issue * * * whether any property interests exist in the first place." Pet. App. 55a.

That reasoning is demonstrably incorrect, however, for this Court has made it clear that "[i]t is not material that the economic benefit to which the [taxpayer's] right pertains is not characterized as 'property' by local law." *Drye* v. *United States*, 528 U.S. at 58 n.5 (quoting W. Plumb, *Federal Tax Liens* 27 (3d ed. 1972)). This Court has instead explained that, while state law determines the nature of a taxpayer's interest in property, federal law determines whether that interest is sufficient to constitute "property" or "rights to property" under 26 U.S.C. 6321. As the Court stated in *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (internal quotations omitted):

> [o]nce it has been determined that state law creates sufficient interests in the taxpayer to satisfy the requirements of the statute, state law is inoperative, and the tax consequences thenceforth are dictated by federal law.

Courts are therefore to "look * * * to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye* v. *United States*, 528 U.S. at 58. See also *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958); *Morgan* v. *Commissioner*, 309 U.S. 78, 80 (1940). And, applying this federal standard, this Court has clearly and concisely held that the tax lien attaches to "every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. at 56. The valuable, legally protected rights possessed by each spouse in a tenancy by the entirety constitute "property or rights to property" to which the lien applies under this expansive federal standard. See pages 13-15, *supra*.

2. The court of appeals ultimately appeared to acknowledge in the present case that each spouse possesses valuable rights in a tenancy by the entirety that are protected under state law. The court reasoned, however, that the federal tax lien does not attach to those interests in property—such as the right of survivorship—because the rights of each spouse are not treated as "separate" or "severable" under state law. Pet. App. 57a-58a.

That reasoning conflicts with the plain text of the tax lien statute and with the clear holdings of this Court. The federal tax lien attaches to "*all* property and rights to property" (26 U.S.C. 6321 (emphasis added)), not

merely to property that is immediately transferable by the owner of the interest to a third party. For example, *United States* v. *Rodgers*, 461 U.S. 677, 684-685 (1983), concerned a married taxpayer who held an interest in homestead property that could not be mortgaged, sold or abandoned without the consent of the other spouse under state law. The Court expressly held that the inability of the taxpayer in *Rogers* to exercise his rights separately from the rights of his spouse was not a basis for denying foreclosure of the federal tax lien. *Id.* at 702. The Court concluded that the federal tax lien reaches the taxpayer's interest in "the entire property" and that, in the event that a judicial foreclosure of that lien occurs, the separate rights of the non-liable spouse "are adequately discharged by the payment of compensation." *Id.* at 701, 702. See note 6, *supra*. Courts have therefore consistently held that the federal tax lien on "all property and rights to property" of a delinquent taxpayer attaches not only to presently transferable rights but also to those valuable and legally-protected interests that the taxpayer would not, acting by himself, be able immediately to transfer or sell. See, *e.g.*, *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173, 176 (6th Cir. 1996) (federal tax lien attaches to the interest of the beneficiary of a spendthrift trust) (cited in *Drye* v. *United States*, 528 U.S. at 58 n.5 & 60 n.7); *United States* v. *Rye*, 550 F.2d 682, 684-685 (1st Cir. 1977) (federal tax lien attaches to taxpayer's nonassignable right to receive support payments). The court of appeals thus erred in concluding in this case that the federal tax lien cannot attach to "property" or "rights to property" until those rights are "severable" from the rights of others in the same property.

3. The court of appeals improperly ignored the precedents of this Court in relying on the fact that

Michigan does not authorize the seizure of tenancy by the entirety property for the debts of only one spouse. Pet. App. 52a (citing *Cole* v. *Cardoza*, 441 F.2d at 1343). This Court has frequently held that state-law restrictions on seizure and exemptions from foreclosure do not prevent the attachment and enforcement of the federal tax lien. See *Drye* v. *United States*, 528 U.S. at 59 (quoting *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971) ("exempt status under state law does not bind the federal collector")); Note, *Property Subject to the Federal Tax Lien*, 77 Harv. L. Rev. 1485, 1498 (1964) (stripped of its fiction that husband and wife are a legal unit, the entirety theory "serves much the same function as an exemption created by state law" and thus should not "defeat the federal lien"). As this Court explained in detail in *United States* v. *National Bank of Commerce*, 472 U.S. at 727 (citation omitted):

> The question whether a state-law right constitutes "property" or "rights to property" is a matter of federal law. * * * [T]he facts that under [state] law [the taxpayer's] creditors * * * could not [seize or attach the property] are irrelevant. The federal statute relates to the taxpayer's rights to property and not to his creditors' rights. The Court of Appeals would remit the IRS to the rights only an ordinary creditor would have under state law. That result "compare[s] the government to a class of creditors to which it is superior."

See also *United States* v. *Bess*, 357 U.S. at 57 ("[o]nce it has been determined that state law creates sufficient interests in the insured to satisfy requirements of [the statute], state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States").

For example, in *United States* v. *Rodgers*, 461 U.S. at 701, this Court expressly held that "state-created exemptions against forced sale" of jointly-owned property are ineffective against the federal lien. The tax lien involved in *Rodgers*, like the lien involved here, arose from the tax liability of only one spouse and attached to that spouse's interest in the jointly-owned family residence. The government sought to foreclose on its lien in *Rodgers* by obtaining a judicial sale of the property and compensating the non-liable spouse for her separate interest. Although Texas law protected homestead property from forced sale for the payment of debts (461 U.S. at 684), this Court held that the federal tax lien could be foreclosed on the homestead for the unpaid taxes of one spouse. See note 6, *supra*. The Court reasoned that the Supremacy Clause of the Constitution "provides the underpinning for the Federal Government's right to sweep aside state-created exemptions" (*id.* at 701) and "allows the federal tax collector to convert a non-delinquent spouse's homestead estate into its fair cash value." *Id.* at 703-704.

As this Court pointed out in *Drye* v. *United States*, 528 U.S. at 56-57, the fact that state-law exemptions of property from seizure by creditors are ineffective against the federal tax lien is corroborated by Section 6334(a) of the Code, 26 U.S. 6334(a). That statute lists thirteen specific categories of property that are exempt from administrative levy—such as wearing apparel, tools of a trade, employment benefits, and workmen's compensation. *Ibid.*[8] The categories of property listed

[8] The categories of property that are exempt from levy under 26 U.S.C. 6334(a) are not exempt from judicial sale under 26 U.S.C. 7403 and have been held not to be exempt from the federal tax lien. See *American Trust* v. *American Community Mutual Ins. Co.*, 142 F.3d 920, 925 (6th Cir. 1998); *In re Sills*, 82 F.3d 111, 113 (5th Cir. 1996); *In re Voelker*, 42 F.3d 1050, 1052 (7th Cir. 1994); *United States* v. *Barbier*, 896 F.2d 377, 389 (9th Cir. 1990). The lien on such property could thus be enforced through a judicial foreclosure or upon a voluntary sale.

as exempt from federal levy in Section 6334(a) are exclusive, for the statute specifies that, "[n]otwithstanding any other law of the United States * * *, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." 26 U.S.C. 6334(c). Property held in tenancy by the entirety is *not* among the types of property that are listed as exemptions in this federal statute.[9] See 26 U.S.C. 6334(a). As this Court emphasized in *Drye*, "[t]he fact that * * * Congress provided specific exemptions from distraint is evidence that Congress did not intend to recognize further exemptions which would prevent attachment of [federal tax] liens * * * ." 528 U.S. at 56 (quoting *United States* v. *Bess*, 357 U.S. at 57). "Th[e] language [of Section 6334] is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law." *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971) (quoted at *Drye* v. *United States*, 528 U.S. at 56-57); W. Plumb, *supra*, at 20.

[9] Even though property held in a tenancy by the entirety or any other form of joint ownership is subject to the federal tax lien, the government cannot administratively levy upon any principal residence—regardless of the form of ownership—without the prior approval of a federal district court judge or magistrate. 26 U.S.C. 6334(a)(13) & (e). Moreover, unlike a judicial foreclosure (see note 6, *supra*), the government can administratively seize and sell only the taxpayer's interest in jointly held property. See *United States* v. *Rodgers*, 461 U.S. at 695-696.

4. The court of appeals also erred in relying on the legal fiction employed in Michigan that property held in a tenancy by the entirety is owned by the marital unit, rather than by the individual spouses acting collectively. Pet. App. 51a-53a. The court reasoned that the consequence of this legal fiction is that neither spouse has an interest in "property" or a "right to property" to which the federal tax lien could attach. *Ibid.*

This Court has repeatedly emphasized that federal tax law is not "struck blind" by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59; *United States* v. *Irvine*, 511 U.S. 224, 240 (1994). In *Drye*, the Court applied that principle in holding that the federal tax lien attached to the interest of an heir who disclaimed his rights in an intestate estate even though state law deemed any such disclaimer to have occurred *before* the death of the decedent so that creditors would be unable to attach the disclaimant's interest in the estate. The Court held that application of the federal tax lien statute is not controlled by the legal fictions of state law and that the right of the heir to inherit is "a valuable, transferable, legally protected right" to which the federal tax lien attached before the disclaimer was made. 528 U.S. at 59, 60.

In *United States* v. *Irvine*, 511 U.S. at 239-240, this Court likewise refused to be "struck blind" by the "legal fiction" created by state law that a valid state-law disclaimer of an interest in a trust had the effect of canceling the transfer of that interest to the disclaimant *ab initio*. The Court explained that "Congress had not meant to incorporate state-law fictions as touchstones of taxability" and that the fictional construct of state law did not destroy the reality that the disclaimant possessed—even if only transitorily—a "property" interest in the trust for purposes of federal tax law. *Id.* at 240.[10]

Indeed, in *Tyler* v. *United States*, 281 U.S. 497 (1930), this Court specifically rejected the proposition that federal tax law is governed by the state law fiction that entirety property is owned by the "marital unit" rather than by the spouses acting collectively. That case concerned the constitutionality of the Revenue Act of 1916, ch. 463, § 202(c), 39 Stat. 778, which taxed the total value of entirety property—both the share attributable to the decedent and to the surviving spouse—in the estate of the first spouse to die.[11] The estate administrators contended that the entirety property was owned by the marital unit under state law and that, on the death of the first spouse, the survivor merely retained what she already had. They argued that a transfer of property therefore did not occur on the date of death and that the estate tax, as applied to this situation, constituted an unconstitutional direct tax without apportionment. 281 U.S. at 500. The Court rejected this argument and explained in detail why the "amiable fiction of the common law [that] husband and wife are but one person" is not binding for purposes of federal tax legislation (*id.* at 503):

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[10] In *Irvine*, the Court emphasized that "the general and longstanding rule in federal tax cases [is] that although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed." 511 U.S. at 238. Because federal law controls the determination of what state-created interests constitute "property" within the meaning of federal tax statutes, "state property transfer rules do not translate into federal taxation rules." *Id.* at 239.

[11] Section 2040(b) of the Internal Revenue Code currently includes only one-half of the value of such property in the decedent's gross estate. 26 U.S.C. 2040(b).

> According to the amiable fiction of the common law, * * * husband and wife are but one person. * * * This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights, and powers of tenants by the entirety at common law.

Federal tax law thus looks to "the actual results" rather than merely to "the artificial rules" of state law in determining the nature and taxability of the rights possessed by tenants by the entirety. 281 U.S. at 503. In *Tyler*, because the death of the first spouse resulted in an expansion of the survivor's "actual" property rights, the Court upheld the constitutionality of the estate tax on the entire value of the entirety property. *Id.* at 504.[12]

Although the precise question at issue here was not presented in *United States* v. *Rodgers*, 461 U.S. at 703 n.31, the Court there stated that it was not convinced of the correctness of appellate decisions that, prior to that date, had concluded that the federal tax lien would not attach to a taxpayer's interest in a tenancy by the

[12] In explaining the reasoning of *Tyler* in *United States* v. *Jacobs*, 306 U.S. 363 (1939), the Court emphasized that "[t]he constitutionality of an exercise of the taxing power of Congress is not to be determined by such * * * ancient fictions" as the ownership of entirety property by the marital unit. *Id.* at 369.

entirety.[13] Noting that these older cases had rested on "the peculiar legal fiction governing tenancies by the entirety in some States," the Court emphatically questioned "*if* the tenancy by the entirety cases are correct." *Ibid.* (emphasis in original). As one commentator has observed, the reasoning of the older cases that relied on the state legal fiction of the "marital unit" "was dubious before" and "[n]ow, after *Drye*, its incorrectness is glaringly clear." S. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 Ind. L.J. 1163, 1189-1190 (2000).[14]

C. The Holding Of The Court Of Appeals Would Create Irrationally Disparate Treatment Of Similarly Situated Taxpayers And Would Facilitate Fraud On The Revenue

1. This Court has emphasized the importance in a national tax system of avoiding "inequalities in the

[13] The cases cited by the Court in *Rodgers* are *United States* v. *National Bank*, 255 F.2d 504, 507 (5th Cir. 1958), cert. denied, 358 U.S. 835 (1958), and *United States* v. *Hutcherson*, 188 F.2d 326, 331 (8th Cir. 1951). The Eighth Circuit recently distinguished its decision in *Hutcherson* in *Cox* v. *Commissioner*, 121 F.2d 390, 392 (1997).

[14] Even before *Drye*, commentators had concluded that the reasoning of *United States* v. *Rodgers*, *supra*, and *United States* v. *National Bank of Commerce*, *supra*, required the conclusion that a tenancy by the entirety is subject to the federal tax lien. See S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 871 (1995); Comment, *United States v. National Bank of Commerce: Co-Owners Suffer the "Federal Law Consequences,"* 11 Del. J. Corp. L. 561, 583 (1986); Comment, *Federal Tax Liens and State Homestead Exemptions: The Aftermath of United States v. Rodgers*, 34 Buff. L. Rev. 297, 323 (1985).

administration of the revenue laws" and of ensuring that taxpayers do not receive "treatment different from that given to other taxpayers of the same class." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). The Nation's tax laws are therefore to be interpreted and applied to "ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979).

The decision of the court of appeals disserves that principle. The tenancy by the entirety is a form of property ownership that exists in 24 States, the Virgin Islands and the District of Columbia.[15] Of all the forms of joint property ownership, the tenancy by the entirety is the *only* form that has been treated as exempt from the federal tax lien. Every other type of jointly-owned property has consistently been held subject to the federal tax lien. See, *e.g.*, *United States* v. *Rodgers*, 461 U.S. at 690-691 (homestead property); *United States* v. *Davenport*, 106 F.3d 1333, 1337 (7th Cir. 1997) (joint tenancy); *United States* v. *Kocher*, 468 F.2d 503, 507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973) (tenancy in common); *United States* v. *Overman*, 424 F.2d 1142, 1145 (9th Cir. 1970) (community property);

[15] These States are Alaska, Arkansas, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Mississippi, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. See R. Heaton, *Administration of Entireties Property in Bankruptcy*, 60 Ind. L.J. 305, 309-310 n.24 (1985); 735 Ill. Comp. Stat. Ann. 5/12-112 (West 1993 & Supp. 2000). In addition, between 1972 and 1985, a tenancy by the entirety could be created in Ohio, and an entirety interest created during that period is still treated as valid. Ohio Rev. Code Ann. §§ 5302.17-5302.21 (Anderson 1989 & Supp. 2000); see *In re Cline*, 164 B.R. 592, 593-594 (Bankr. S.D. Ohio 1994).

Washington v. *United States*, 402 F.2d 3, 7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971) (property subject to dower interest). Under the decision in this case, a taxpayer who owns property in a tenancy by the entirety is thus treated more favorably than a taxpayer who owns property in the 26 States that do not recognize, or have abolished, that form of ownership.[16]

There is no adequate basis in the text or the purpose of the federal tax lien statute for this difference in treatment. To the contrary, as this Court has stated, there is a "sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation." *United States* v. *Jacobs*, 306 U.S. 363, 370 (1939). In all other respects, these two forms of ownership have consistently received equal treatment under the revenue laws (*ibid.* (emphasis added)).

> A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person." *Only a fiction stands between the two.* Survivorship is the predominant and distinguishing feature of each.

Even within the group of States that recognize tenancies by the entirety, the decision in this case produces

[16] As part of the progressive recognition of women's property rights during the Nineteenth Century (under what were generally known as the Married Women's Property Acts), several western States never chose to adopt the tenancy by the entirety and several other States elected to abolish or restrict that form of ownership. S. Johnson, *supra*, 60 Mo. L. Rev. at 843. See, *e.g.*, *Kerner* v. *McDonald*, 60 Neb. 663, 84 N.W. 92 (1900). In England, where the tenancy by the entirety originated, that form of ownership was abolished in 1925. S. Johnson, *supra*, 60 Mo. L. Rev. at 843.

inconsistent treatment. Under the decision below, taxpayers who own entirety property in the States where creditors can attach such property for a debt owed by *one* spouse are treated less favorably than taxpayers who own such property in the States where creditors can attach such property only for a debt owed by *both* spouses.[17] See, *e.g.*, *Geiselman* v. *United States*,

[17] Fourteen States (and the Virgin Islands and the District of Columbia) prohibit creditors from attaching entirety property for the debts of only one spouse: Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Michigan, Missouri, North Carolina, Pennsylvania, Rhode Island, Virginia, Vermont and Wyoming. See *Mitchell* v. *Wilmington Trust Co.*, 449 A.2d 1055, 1057-1058 (Del. Ch. 1982), aff'd, 461 A.2d 696 (Del. Super. Ct. 1983); *Finley* v. *Thomas*, 691 A.2d 1163, 1166 (D.C. 1997); *Sitomer* v. *Orlan*, 660 So. 2d 1111, 1114 (Fla. Dist. Ct. App. 1995); *Sawada* v. *Endo*, 57 Haw. 608, 617, 561 P.2d 1291, 1297 (1977); 735 Ill. Comp. Stat. 5/12-112 (West 1993 & Supp. 2000); *Diss* v. *Agri Bus. Int'l, Inc.*, 670 N.E.2d 97, 99 (Ind. Ct. App. 1996); *State* v. *One 1984 Toyota Truck*, 311 Md. 171, 187, 533 A.2d 659, 667 (1987); *SNB Bank & Trust* v. *Kensey*, 145 Mich. App. 765, 775-777, 378 N.W.2d 594, 599 (1985); *In re Van Der Heide*, 164 F.3d 1183, 1184 (8th Cir. 1999) (Missouri law); *Dealer Supply Co.* v. *Greene*, 108 N.C. App. 31, 34, 422 S.E.2d 350, 352 (1992), review denied, 333 N.C. 343, 426 S.E.2d 704 (1993); *Koffman* v. *Smith*, 453 Pa. Super. 15, 27, 682 A.2d 1282, 1288 (1996); *Bloomfield* v. *Brown*, 67 R.I. 452, 25 A.2d 354 (1942); *Masonry Prods., Inc.* v. *Tees*, 280 F. Supp. 654, 657 (D.V.I. 1968); *Rogers* v. *Rogers*, 257 Va. 323, 326, 512 S.E.2d 821, 822 (Va. 1999); *Lowell* v. *Lowell*, 138 Vt. 514, 516, 419 A.2d 321, 322 (1980); *Colorado Nat'l Bank* v. *Miles*, 711 P.2d 390, 393-394 (Wyo. 1985). Nine of the States that recognize the tenancy by the entirety, however, permit creditors to attach one spouse's interest in such property for the debts of only that spouse, subject to the rights of the nondebtor spouse: Alaska, Arkansas, Kentucky, Massachusetts, New Jersey, New York, Oklahoma, Oregon, Rhode Island, and Tennessee. See Alaska Stat. § 09.38.100(a) (Michie 2001); *Morris* v. *Solesbee*, 48 Ark. App. 123, 128, 892 S.W.2d 281, 283 (1995); *Hoffman* v. *Newell*, 60 S.W.2d 607, 613 (Ky. 1932); *In re*

961 F.2d 1, 7 (1st Cir.), cert. denied, 506 U.S. 891 (1992) (husband's interest in entirety property is subject to the federal tax lien because Massachusetts law permits creditors to attach his interest in the property); *United States* v. *Diemer*, 859 F. Supp. 126, 131 (D.N.J. 1994), rev'd on other grounds *sub nom. United States* v. *Avila*, 88 F.3d 229 (3d Cir. 1996) (same under New Jersey law); *United States* v. *Brynes*, 848 F. Supp. 1096, 1099 (D.R.I. 1994) (same under Rhode Island law); *United States* v. *Ragsdale*, 206 F. Supp. 613 (W.D. Tenn. 1962) (same under Tennessee law).

The arbitrary inequality of treatment that results under the rationale of the court of appeals is magnified by the fact that entirety ownership is not limited to real estate. At least fifteen jurisdictions also allow personal property—such as automobiles, stocks, bonds and bank accounts—to be owned in a tenancy by the entirety.[18]

Snyder, 231 B.R. 437, 442 (Bankr. D. Mass. 1999); *United States* v. *Jones*, 877 F. Supp. 907, 916-920 (D.N.J. 1995), aff'd mem., 74 F.3d 1228 (3d Cir. 1995); *BNY Fin. Corp.* v. *Moran*, 154 Misc. 2d 435, 436, 584 N.Y.S.2d 261, 262 (Sup. Ct. 1992); Okla. Stat. Ann. tit. 60, § 74 (West 1994); *Wilde* v. *Mounts*, 95 Or. App. 522, 524-525, 769 P.2d 802, 803-804 (1989); *Arango* v. *Third Nat'l Bank of Nashville*, 992 F.2d 611, 613 (6th Cir. 1993) (Tennessee law). The rule in Mississippi is uncertain. See *Cuevas* v. *Cuevas*, 191 So. 2d 843 (Miss. 1966).

[18] These jurisdictions are: Alaska, Arkansas, Delaware, the District of Columbia, Florida, Hawaii, Kentucky, Maryland, Massachusetts, Missouri, Oklahoma, Pennsylvania, Tennessee, Vermont, and Virginia. See *Faulk* v. *Estate of Haskins*, 714 P.2d 354 (Alaska 1986); *Boggs* v. *Boggs*, 26 Ark. App. 188, 190, 761 S.W.2d 956, 957 (1988); *Ciconte* v. *Barba*, 161 A. 925 (Del. Ch. 1932); *In re Estate of Wall*, 440 F.2d 215, 219 (D.C. Cir. 1971); *Beal Bank, SSB* v. *Almand & Assoc., Inc.* 780 So. 2d 45, 53-54 (Fla. 2001); *Traders Travel Int'l Inc.* v. *Howser*, 69 Haw. 609, 613, 753 P.2d 244, 246 (1988); Ky. Rev. Stat. Ann. § 140.050 (Michie 1991); *State* v. *One 1984 Toyota Truck*, 69 Md. App. 235, 237-238, 517 A.2d 103, 104

Several other States allow some, but not all, types of personal property to be owned in a tenancy by the entirety.[19] And one jurisdiction that extends a tenancy by the entirety to personal property has recently expanded the protections of ownership in tenancy by the entirety to members of the same sex who form a "civil union." See Vt. Stat. Ann. tit. 15, §§ 1202(2), 1204(e)(1).

2. The decision in this case not only produces inconsistent treatment of similarly situated taxpayers, it also provides significant opportunities for obstructing and avoiding the collection of taxes. Under the reasoning of the decision below, both spouses may earn income, fail to file returns or file only separate returns,[20] place their

(1986), aff'd, 311 Md. 171, 533 A.2d 659 (1987); *Woodard* v. *Woodard*, 216 Mass. 1, 2, 102 N.E. 921 (1913); *Hallmark* v. *Stillings*, 648 S.W.2d 230, 233 (Mo. Ct. App. 1983); 60 Okla. Stat. Ann. § 74 (West 1994); *Madden* v. *Gosztonyi Sav. & Tr. Co.*, 331 Pa. 476, 483, 200 A. 624, 628 (1938); *White* v. *Watson*, 571 S.W.2d 493, 495 (Tenn. Ct. App. 1978); *Beacon Milling Co.* v. *Larose*, 138 Vt. 457, 461, 418 A.2d 32, 33 (1980); *Oliver* v. *Givens*, 204 Va. 123, 126, 129 S.E.2d 661, 663 (1963).

[19] For example, Michigan allows bonds, stocks, mortgages, promissory notes, debentures, and other financial assets to be held in a tenancy by the entirety. *DeYoung* v. *Mesler*, 373 Mich. 499, 505, 130 N.W.2d 38, 41 (1964) (dissenting opinion). In Michigan and Indiana, personalty derived from real estate (such as crops) and the proceeds of the sale of real estate may be owned in tenancy by the entirety when the underlying real estate was itself held in that form of ownership. See *ibid.*; *Koehring* v. *Bowman*, 194 Ind. 433, 142 N.E. 117, 118 (1924).

[20] Married taxpayers become jointly and severally liable for taxes when they elect to file joint returns. See 26 U.S.C. 6013(d)(3). Since, if they file a joint return, both spouses are liable for the resulting taxes, property held in a tenancy by the entirety could then be seized for collection. See Pet. App. 52a; W. Plumb, *supra*, at 37. The tax avoidance scheme sanctioned by the court of

assets—such as real property, stocks, bonds and bank accounts—in a tenancy by the entirety, and claim an exemption of that property from tax collection. They could then use that "exempt" property to earn income, to pay debts to third parties or to make gifts to family members free and clear of any lien or liability for taxes. It is difficult to conceive of a more simple or widely available method of evading the collection of taxes. As Judge Ryan emphasized in his separate opinion in this case, the majority opinion "not only contravenes established precedent, but provides an avenue for easy avoidance of federal income-tax laws." Pet. App. 69a.

The ready pathway for tax avoidance permitted under the decision below is illustrated by the pending case of *Hatchett* v. *IRS*, 126 F. Supp. 2d 1038 (E.D. Mich. 2000), appeal docketed, No. 00-1645 (6th Cir. June 13, 2000). That case involves a lawyer who accrued federal tax debts exceeding $8,000,000 for 1975 through 1991. Instead of paying these taxes, the lawyer used his untaxed income to accumulate equity in four valuable parcels of real estate that he placed in a tenancy by the entirety. The district court concluded that the federal tax liens did not attach to these properties under the reasoning applied by the court of appeals in this case. 126 F. Supp. 2d at 1050-1051.

It is implausible to conclude that, in enacting the broad text of the federal tax lien statute, Congress intended to authorize such facile and transparent schemes to avoid tax collection. Instead, as this Court has emphasized, in drafting this lien provision, "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes."

appeals in this case thus operates only when married taxpayers file no returns or file separate, rather than joint, returns.

Glass City Bank v. *United States*, 326 U.S. at 267. The decision of the court of appeals has thus, in short, "left us with a rule which compromises the revenue, creates a ready pathway for tax avoidance, defeats equal treatment of taxpayers, and lacks any defensible doctrinal underpinning." S. Johnson, *supra*, 60 Mo. L. Rev. at 888. See also Note, *Property Subject to the Federal Tax Lien*, 77 Harv. L. Rev. at 1498.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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NOVEMBER 2001

(6)

No. 00-1831

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JUNE 8, 2001
CERTIORARI GRANTED: SEPT. 25, 2001

110 pp
$4.50

EDITOR'S NOTE

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Docket No. 93-CV-30638

SANDRA L. CRAFT, PLAINTIFFS

v.

UNITED STATES OF AMERICA,
DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
4/23/93	1	COMPLAINT TO QUIET TITLE (38 pgs) filed w/exhibits A-L [Entry date 4/26/93]
4/23/93	–	FILING FEE PAID on 4/23/93 in the amount of $120.00 (Receipt #024272) [Entry date 04/26/93]
4/23/93	–	SUMMONS issued as to deft IRS and returned to pltf's rep. [Entry date 4/26/93]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/28/93	4	SUMMONS AND RETURN OF SERVICE executed personally upon defendant IRS via deft's counsel, Terry Zabel, on 4/27/93
		* * * * *
7/15/93	7	ANSWER to complaint by defendant IRS [Entry date 7/16/93]
		* * * * *
9/10/93	12	MOTION by plaintiff Sandra L. Craft for summary judgment; O/A requested w/brief in support and proof of service [Entry date 09/14/93]
9/13/93	13	MOTION by defendant IRS for summary judgment w/brief in support, attached exhibits and proof of service [Entry date 09/14/93]

DATE	DOCKET NUMBER	PROCEEDINGS
10/5/93	14	RESPONSE IN OPPOSITION by defendant IRS to pltf's motion for summary judgment [12-1] w/proof of service [Entry date 10/06/93]
10/12/93	15	NOTICE of hearing re Cross-motions for summary judgment [12-1] & [13-1]; O/A scheduled for hearing on 10/22/93 at 9:30 is adjourned w/out date; briefing ddls have been extended by two weeks (cc: all counsel) [Entry date 10/13/93]
10/22/93	16	RESPONSE BRIEF IN OPPOSITION by plaintiff Sandra L. Craft to the United States' motion for partial summary judgment [13-1] w/exhibit 1 [Entry date 10/25/93]
10/29/93	17	REPLY BRIEF by plaintiff Sandra L. Craft in support of pltf's motion for summary judgment [12-1] [Entry date 11/01/93]

DATE	DOCKET NUMBER	PROCEEDINGS
11/3/93	18	SUPPLEMENT by defendant IRS in support of the United States' Motion for summary judgment [13-1] w/cert of svc and exhibit #8 [Entry date 11/04/93]
		* * * * *
7/18/94	23	SUPPLEMENTAL BRIEF IN OPPOSITION by pltf Craft re United States' motion for partial summary judgment [13-1] [Entry date 07/19/94]
		* * * * *
7/21/94	-	PROCEEDING before Judge Gordon J. Quist on 7/21/94 from 3:00 – 4:35 p.m. re Cross-motions for summary judgment [13-1], [12-1]; Motions taken under advisement; Court Reporter – Diane Calsbeek [Entry date 07/26/94]
8/5/94	25	SUPPLEMENTAL BRIEF by dft in support of United States' motion for summary judgment [13-1] w/cert of svc [Entry date 08/08/94]

DATE	DOCKET NUMBER	PROCEEDINGS
9/12/94	26	OPINION (7 pgs) by Judge Gordon J. Quist (cc: all counsel) [Entry date 09/13/94]
9/12/94	27	ORDER (1 pg) in accordance w/the Opinion by Judge Gordon J. Quist granting dft's motion for summary judgment [13-1]; denying pltf's motion for summary judgment [12-1]; terminating case (cc: counsel) [Entry date 09/13/94]
9/22/94	28	MOTION by pltf for new trial under FRCP 59(a), or in the alternative to amend judgment under FRCP 59(e) as to fraudulent conveyance issue w/brief in support [Entry date 09/23/94]
9/22/94	29	MOTION by pltf to amend judgment under FRCP 52(b) & 59(e) as to attachment of federal tax lien issue w/brief in support and exhibit 1 [Entry date 09/23/94]

DATE	DOCKET NUMBER	PROCEEDINGS
9/22/94	30	MOTION by pltf to stay execution pursuant to FRCP 62(b) w/brief in support [Entry date 09/23/94]
9/22/94	31	MOTION by pltf to refer case to Bankruptcy Court for determination of Don Craft's property interests pursuant to 28 USC Sec. 157(a) and W.D.L.R. 57 w/brief in support [Entry date 09/23/94]
		* * * * *
10/7/94	33	RESPONSE IN OPPOSITION by dft IRS to pltf's motion to amend judgment under FRCP 52(b) & 59(e) as to attachment of federal tax lien issue [29-1] w/cert of svc [Entry date 10/13/94]
10/7/94	34	RESPONSE IN OPPOSITION by dft IRS to pltf's motion for new trial under FRCP 59(a) [28-1], or in the alternative, to amend judgment under FRCP as to fraudulent conveyance issue [28-2] w/cert of svc [Entry date 10/13/94]

DATE	DOCKET NUMBER	PROCEEDINGS
10/7/94	35	RESPONSE IN OPPOSITION by dft IRS to pltf's motion to refer case to Bankruptcy Court for determination of Don Craft's property interests pursuant to 28 USC Sec. 157(a) and W.D.L.R. 57 [31-1] w/cert of svc [Entry date 10/13/94]
11/17/94	36	OPINION (4 pgs) by Judge Gordon J. Quist (cc: all counsel)
11/17/94	37	ORDER (2 pgs) in accordance w/the Opinion by Judge Gordon J. Quist: Pltf's motion to refer case to Bankruptcy Court for determination of Don Craft's property interests pursuant to 28 USC Sec. 157(a) W.D.L.R. 57 [31-1] is denied; Pltf's motion to stay execution pursuant to FRCP 62(b) [30-1] is granted; Pltf's motion to amend judgment under FRCP 52(b) & 59(e) as to attachment of federal tax lien issue [20-1] is grnated – pltf's complaint is reinstated for further proceedings to determine the value of pltf's

DATE	DOCKET NUMBER	PROCEEDINGS
		interest in the property as of 8/28/89; and Pltf's motion for new trial under FRCP 59(a) [28-1] and/or to amend judgment under FRCP 59(e) as to fraudulent conveyance issue [28-2] is denied; Case reopened (cc: all counsel)
		* * * * *
2/27/95	40	RENEWED MOTION by dft for summary judgment w/ mem of law in support, declaration in support, exhibits & prf of svc [Entry date 02/28/95]
5/17/95	41	MOTION by pltf for leave to file delayed response to mtn for summary judgment w/proposed pldg. [Entry date 05/18/95]
5/18/95	42	ORDER (1 pg) by Judge Gordon J. Quist granting pltf's motion for leave to file delayed response to mtn for summary judgment [41-1] (cc: all counsel)

DATE	DOCKET NUMBER	PROCEEDINGS
5/18/95	43	RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION by pltf to the USA's renewed motion for summary judgment [40-1] w/exhibits A-G & attachments [Edit date 05/18/95]
5/24/95	44	OPPOSITION by USA to pltf's mtn for leave to file response to USA's renewed mtn for summary judgment w/cert of svc [Entry date 05/26/95]
5/30/95	45	REPLY BRIEF by dft in support of the United States' Motion for summary judgment [40-1] w/cert of svc [Entry date 06/01/95]
7/12/95	46	OPINION AND ORDER (3 pgs) by Judge Gordon J. Quist denying the United States' Renewed Motion for summary judgment [40-1] (cc: all counsel) [Entry date 07/14/95]

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
9/6/95	49	STIPULATION OF FACTS submitted by pltf & dft re fair mkt value of the Berwyck property over a period of years [Entry date 09/07/95]
9/11/95	-	PROCEEDING before Judge Gordon J. Quist; Pretrial conf held; Trial cancelled; Final briefs due in 14 days (9/25/95); Ct Rptr – D. Calsbeek [Entry date 09/12/95]
9/11/95	50	ORDER (1 pg) by Judge Gordon J. Quist: In accordance w/the final pretrial conf held on 9/11/95, the trial set for 9/13/95 is cancelled; The ptys have 14 days to submit final briefs (9/25/95) (cc: all counsel on 9/12/95) [Entry date 09/12/95]
9/21/95	51	SUPPLEMENTAL BRIEF by dft IRS re Order [50-1] w/exhibit 1 and cert of svc [Entry date 09/22/95]

DATE	DOCKET NUMBER	PROCEEDINGS
9/25/95	52	SUPPLEMENTAL BRIEF by pltf re scheduling order [50-1] [Entry date 09/26/95]
10/26/95	53	OPINION (3 pgs) by Judge Gordon J. Quist (cc: all counsel on 10/27) [Entry date 10/27/95]
10/26/95	54	FINAL JUDGMENT (1 pg) by Judge Gordon Quist in accordance w/the Opinion awarding the United States $50,293.94 of the escrowed sales proceeds from the Berwyck property; The remainder of the escrowed fund will be released to the pltf; terminating case (cc: all counsel on 10/27/95) [Entry date 10/27/95]
12/22/95	56	NOTICE OF APPEAL to Circuit Court by plaintiff Sandra L. Craft, [54-2] re: decision entered on 10/26/95 and Order entered on 9/12/94 [Entry date 01/03/96]
12/22/95	57	RECEIPT # 033540 in the amount of $105.00 submitted by Sandra L. Craft for appeal fee [Entry date 01/03/96]

DATE	DOCKET NUMBER	PROCEEDINGS
12/26/95	55	NOTICE OF APPEAL to Circuit Court by dft IRS re the Final Judgment entered on 10/26/95 [54-1] w/cert of svc [Entry date 12/27/95]
		* * * * *
1/8/97	-	MAILED record on appeal to CCA re: CCA # 96-1038/1039, appeal [55-1], appeal [56-1]; consisting of 3 vol. of pleadings, 1 vol. of transcripts, 0 vol. of depositions pursuant to a request from CCA (cc: all counsel)
1/16/96	60	TRANSCRIPT of Motion Hearing held July 21, 1994 before Judge Gordon J. Quist, transcribed by Dianne C. Calsbeek, Court Reporter (ghl)
1/24/97	65	TRANSMISSION FORM showing record of appeal [55-1], appeal [56-1] filed by CCA on 1/15/97 and assigned CCA 96-1038 [Entry date 01/29/97]

DATE	DOCKET NUMBER	PROCEEDINGS
4/3/98	66	INFORMATION copy of slip opinion from CCA reversing/ remanding judgment/order, [54-2] re: CCA # 96-1038/1039 appeal [55-1], appeal [56-1] for further proceedings in accordance with this opinion [Edit date 04/10/98]
5/29/98	67	MANDATE from Sixth Circuit Court of Appeals re: CCA #: 96-1038: 96-1039; reversing and remanding the Decision of the District Court [Appeal [55-1] reversing and remanding the Decision of the District Court [Appeal [56-1] re: order/judgment # 54 as to deft IRS. The certified record will be sent under-separate cover.
6/3/98	68	ORDER Scheduling Rule 16 Status Conference by Judge Gordon J. Quist; a status conf is set for 8/5/98 at 4:00 p.m. before Judge Quist; a joint status report must be filed three (3) business days prior to the scheduled conf (7/13/98) (cc: all counsel 6 3/98) [Entry-date 06/08/98]

DATE	DOCKET NUMBER	PROCEEDINGS
6/22/98	-	RECORD on Appeal returned from CCA re: CCA # 96-1039, appeal [55-1], appeal [56-1]; consisting of three (3) vol. of pleadings, one (1) vol. of transcripts, no (0) vol. of depositions [Entry date 06/23/98]
8/3/98	69	JOINT STATUS REPORT filed
8/5/98	-	PROCEEDING before Judge Gordon J. Quist; Rule 16 Status Conf held in chambers [Entry date 08/11/98]
		* * * * *
10/8/98	73	MOTION by pltf for summary judgment [Entry date 10/09/98]
10/13/98	74	ORDER (1 pg) by Judge Gordon J. Quist denying pltf's motion for summary judgment [73-1] (cc: all counsel 10/14/98) [Entry date 10/14/98]
		* * * * *
11/16/98	76	TRIAL BRIEF submitted by pltf [Entry date 11/17/98]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/24/98	79	TRIAL BRIEF submitted by deft w/cert of svc [Entry date 11/25/98]
11/30/98	-	PROCEEDING before Judge Gordon J. Quist; final Pretrial conf held [Entry date 12/01/98]
12/1/98	-	PROCEEDING before Judge Gordon J. Quist; Bench Trial Day 1; concluded; parties shall have fourteen days to file post trial briefs and until 1/1/99 to file response briefs; Court Reporter: Diane Calsbeek [Entry date 12/02/98]
12/1/98	80	FINAL PRE-TRIAL ORDER approved (7 pgs) by Judge Gordon J. Quist (cc: all counsel 12/2/98) [Entry date 12/02/98]
		* * * * *
12/18/98	82	POST TRIAL BRIEF by pltf [Entry date 12/21/98]
		* * * * *
12/29/98	85	POST TRIAL BRIEF by deft [Entry date 01/06/99]

DATE	DOCKET NUMBER	PROCEEDINGS
1/7/99	86	POST TRIAL RESPONSE BRIEF by pltf [Entry date 01/11/99]
3/30/99	87	FINDINGS OF FACT and CONCLUSIONS OF LAW (25 pgs) by Judge Gordon J. Quist: a judgment consistent w/these Findings of Fact and Conclusions of law will be entered (cc: all counsel 3/30/99) [Entry date 04/01/99]
3/30/99	88	JUDGMENT: (1 pg) by Judge Gordon J. Quist: the US is awarded $6,693 of the ex-crowed [sic] sales proceeds from the Berwyck Property, plus interest on that amt from 10/26/95; the remainder of the escrowed sales proceeds plus interes [sic] shall be delivered to the pltf; terminating case (cc: all counsel 3/30/99) [Entry date 04/01/99]
4/2/99	89	MOTION by pltf to amend judgment under FRCP 52 & 59 w/brief in support [Entry date 04/05/99]

DATE	DOCKET NUMBER	PROCEEDINGS
4/26/99	90	MEMORANDUM ORDER (4 pgs) by Judge Gordon J. Quist granting in part and denying in part pltfs motion to amend judgment under FRCP 52 & 59 [89-1]; the judgment entered 3/30/99 is AMENDED to provide that $6,693 is awarded to the US w/out interest and that the remainder of the escrowed sales proceeds shall be delivered to pltf w/out interest (cc: all counsel)
6/11/99	91	TRANSCRIPT of Bench Trial held 12/1/98 before Judge Gordon J. Quist; transcribed by Diane C. Calasbeek [Entry date 06/14/99]
6/22/99	92	NOTICE OF CROSS-APPEAL to Circuit Court of Appeals by pltf Sandra L. Craft re decision [90-1] entered on 4/26/99 [Entry date 06/23/99]
6/24/99	93	NOTICE OF APPEAL to Circuit Court of Appeals by deft IRS re decision [90-1] entered on 4/26/99 w/cert of svc [Entry date 06/25/99]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 96-1038

SANDRA L. CRAFT, PLAINTIFF-APPELLANT/
CROSS-APPELLEE

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH
THE COMMISSIONER OF INTERNAL REVENUE,
DEFENDANT-APPELLEE/CROSS-APPELLANT

[Decided: Apr. 1, 1998]

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/10/96	Civil Case Docketed. Notice filed by counsel for Appellant Cross-Appellee Sandra L. Craft. Transcript needed:
	* * * * *
8/21/96	BRIEF filed by Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft. Copies: 5. Certificate of Service date 8/20/96. Number of Pages: 38.
8/21/96	Request to require oral argument filed by Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft.

DATE	PROCEEDINGS
	* * * * *
10/7/96	BRIEF filed by Sara S. Holderness for Appellee Cross-Appellant CIR in 96-1038, and 96-1039 Copies: 05. Certificate of Service date 10/4/96. Number of Pages: 57.
10/7/96	Request to require oral argument filed by Sara S. Holderness for Appellee Cross-Appellant CIR in 96-1038, and 96-1039
	* * * * *
11/25/96	BRIEF filed by Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft in 96-1038, Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft in 96-1039. Copies: 6. Certificate of service date 11/19/96 Number of Pages: 20 + 6.
11/25/96	SEE RULING ON 11/25/96. BRIEF filed by Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft in 96-1038, Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft in 96-1039. Copies: 7. Certificate of service date 11/22/96. Number of Pages: 21 + 6.
	* * * * *
12/23/96	BRIEF filed by Marion E.M. Erickson for Appellee Cross-Appellant CIR in 96-1038, in 96-1039. Copies: 5. Certificate of service date 12/18/96. Number of Pages: 10+ 2.

DATE	PROCEEDINGS
12/27/96	BRIEFING LETTER SENT resetting cross appeal briefing schedule: appendix 1/9/97
1/10/97	APPENDIX filed by Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft in 96-1038, in 96-1039. Copies: 5. Certificate of service date 1/9/97
1/13/97	APPENDIX TENDERED. Received from Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft in 96-1038, in 96-1039. Copies: 5. Certificate of service date 1/9/97 Corrections to be made: index of appendix incorrect new index; due 1/14/97 for Jeffrey Alan Moyer in 96-1038, in 96-1039
1/14/97	Appellant LETTER filed correcting appendix defect. Corrections made: new index received and placed in each copy of joint appendix. Letter from Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft in 96-1038, in 96-1039. Certificate of service date 1/14/97
1/15/97	CERTIFIED RECORD filed. Volumes include 1 Tr; 3 Pl.
3/20/97	ADDITIONAL CITATION filed by Sara S. Holderness for Appellee Cross-Appellant CIR. Certificate of service 3/18/97.

DATE	PROCEEDINGS
7/30/97	Oral argument date set for 9/16/97 in court room 636. Notice of argument sent to counsel.
9/16/97	CAUSE ARGUED on 9/16/97 by Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft in 96-1038, David Carmack for Appellee Cross-Appellant CIR in 96-1038 before Judges Ryan, Suhrheinrich, Cole.
1/30/98	ADDITIONAL CITATION filed by Jeffrey Alan Moyer for Appellant Cross-Appellee Sandra L. Craft. Certificate of service 1/30/98.
2/9/98	NOTIFICATION filed by Jeffrey Alan Moyer – change of address. Dated: 2/6/98 Automation notified.
4/1/98	OPINION filed: the judgment of the district court granting summary judgment to the defendant USA is REVERSED and the case in REMANDED for further proceedings. Decision for publication pursuant to local rule 24. James L. Ryan, concurring, Richard F. Suhrheinrich, Circuit Judge, R. G. Cole, Authoring Judge.
4/1/98	JUDGMENT: REVERSED and remanded.
5/27/98	MANDATE ISSUED with no cost taxed.

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 99-1734

SANDRA L. CRAFT, PLAINTIFF-APPELLEE/
CROSS-APPELLANT

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE
COMMISSIONER OF INTERNAL REVENUE, DEFENDANT-
APPELLANT/CROSS-APPELLEE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/29/99	Civil Case Docketed. Notice filed by Appellant Sandra L. Craft. Transcript needed:
	* * * * *
10/13/99	PETITION for en banc hearing filed by David English Carmack for Appellant Cross-Appellee CIR. Certificate of service date 10/12/99.
	* * * * *

DATE	PROCEEDINGS
11/12/99	RESPONSE to a petition for en banc hearing, filed by David English Carmack. Response filed by Jeffrey Alan Moyer for Appellee Cross-Appellant Sandra L. Craft. Certificate of service date 11/12/99.
	* * * * *
12/2/99	ORDER filed denying petition for en banc hearing [2030443-1] filed by David English Carmack Entered by order of the court.
	* * * * *
12/30/99	Appellant MOTION filed to file supplemental brief. Motion filed by Joan I. Oppenheimer for Appellant Cross-Appellee CIR in 99-1734, 99-1737. Certificate of service date 12/29/99.
12/30/99	ADDITIONAL CITATION filed by Joan I. Oppenheimer for Appellant Cross-Appellee CIR in 99-1734, 99-1737. Certificate of service date 12/29/99.
12/30/99	TENDERED: Supplemental "Opening Brief" from Joan I. Oppenheimer for Appellant Cross-Appellee USA, CIR in 99-1737.
1/7/00	RULING granting motion to file supplemental brief [2074560-1] filed by Joan I. Oppenheimer appellee may file a response, nte 6 pages. Response due by 1/18/00 for Jeffrey Alan Moyer in 99-1734.

DATE	PROCEEDINGS
1/7/00	Supplemental brief filed by Joan I. Oppenheimer for Appellant Cross-Appellee CIR in 99-1734/99-1737. Copies: 4. Certificate of service date 12/29/99. Number of pages: 6.
1/11/00	APPENDIX filed by Joan I. Oppenhemier for Appellant Cross-Appellee USA, Appellant Cross-Appellee CIR in 99-1734, 99-1737. Copies: 05 – 2 volumes. Certificate of service date 1/7/00
1/18/00	Supplemental brief filed by Jeffrey Alan Moyer for Appellee Cross-Appellant Sandra L. Craft in 99-1734, in 99-1737. Copies: 4. Certificate of service date 1/17/00. Number of pages: 6.
1/21/00	FINAL BRIEF filed by Jeffrey Alan Moyer for Appellee Cross-Appellant Sandra L. Craft in 99-1734. Copies: 07 Certificate of service date 1/20/00. Number of pages: 36 (8,621).
1/21/00	Request to require oral argument filed by Jeffrey Alan Moyer for Appellee Cross-Appellant Sandra L. Craft in 99-1734, 99-1737
1/21/00	FINAL BRIEF filed by Jeffrey Alan Moyer for Appellee Cross-Appellant Sandra L. Craft in 99-1734, 99-1737. Copies: 07. Certificate of service date 1/20/00. Number of Pages: 23 (3,285).

DATE	PROCEEDINGS
1/24/00	FINAL BRIEF filed by Joan I. Oppenheimer for Appellant Cross-Appellee USA, Appellant Cross-Appellee CIR in 99-1734, 99-1737. Copies: 07. Certificate of service date 1/19/00. Number of Pages: 47 (10,133).
2/7/00	FINAL BRIEF filed by Joan I. Oppenheimer for Appellant Cross-Appellee USA, Appellant Cross-Appellee CIR in 99-1734, 99-1737. Copies: 07. Certificate of Service date 1/21/00. Number of Pages: 60 (14,092).
2/7/00	Request to require oral argument filed by Joan I. Oppenheimer for Appellant Cross-Appellee USA, Appellant Cross-Appellee CIR in 99-1734, 99-1737
	* * * * *
8/10/00	CAUSE ARGUED on 8/10/00 by Joan I. Oppenhemier for Appellant Cross-Appellee USA in 99-1734/99-1737, Jeffrey Alan Moyer for Appellee Cross-Apellant Sandra L. Craft in 99-1734/99-1737, before Judges Keith, Cole, Gilman.

DATE	PROCEEDINGS
11/22/00	OPINION filed: the district court's judgment is AFFIRMED, we deny Craft's motion for litigation costs and the motion to dismiss the government's appeal. Decision for publication pursuant to local rule 206. Damon J. Keith, R. G. Cole (AUTHORING), Ronald L. Gilman, concurring; Circuit Judges.
11/22/00	JUDGMENT: AFFIRMED.
1/8/01	PETITION for en banc rehearing filed by David English Carmack for Appellant Cross-Appellee CIR. Certificate of service date 1/5/01.
2/1/01	LETTER SENT by blh to Jeffrey Alan Moyer for Appellee Cross-Appellant Sandra L. Craft notifying that party is directed to respond to a petition for en banc rehearing [2284336-1] filed by David English Carmack. Response due by 2/15/01.
2/15/01	RESPONSE to a petition for en banc rehearing [2284336-1] filed by David English Carmack. Response filed by Jeffrey Alan Moyer for Appellee Cross-Appellant Sandra L. Craft. Certificate of service date 2/14/01.
3/16/01	ORDER filed denying petition for en banc rehearing [2284336-1] filed by David English Carmack Damon J. Keith, R. G. Cole, Ronald L. Gilman, Circuit Judges.

DATE	PROCEEDINGS
3/26/01	MANDATE ISSUED with no cost taxed.

* * * * *

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[NAMES OMITTED]

January 21, 1993

Ms. Diane Chiles
TRANSAMERICA TITLE
921 North Division
Grand Rapids, Michigan 49503

Re: Sandra Craft and Don Craft Escrowed Funds

Dear Ms. Chiles:

This letter should serve as sufficient documentation and authority for TransAmerica Title to release the full amount of $119,888.20 currently being escrowed in the name of Sandra Craft to the law firm of Rhoades, McKee, Boer, Goodrich & Titta. The release of these funds is with the knowledge and consent of the Internal Revenue Service with the understanding that upon

receipt of those funds, the law firm of Rhoades, McKee, Boer, Goodrich & Titta will disburse one-half of those funds to Mrs. Sandra Craft as the Internal Revenue Service has no claim against her share of those funds. The remaining one-half, or $59,944.10 will be placed in an interest bearing account at the law firm of Rhoades, McKee, Boer, Goodrich & Titta until such time as a resolution of the tax lien dispute is reached and an agreement is signed by both the Internal Revenue Service and representatives of Don Craft or until ordered to release those funds by an appropriate court order.

The signatures listed below should serve as sufficient authority for TransAmerica Title to release those funds to Rhoades, McKee, Boer, Goodrich & Titta. The Crafts thank you for your time, cooperation and understanding in holding those funds in escrow for them until now.

Very truly yours,

RHOADES, MCKEE, BOER, GOODRICH & TITTA

/s/ JEFF MOYER
JEFF A. MOYER
Attorney For Sandra And
Don Craft

JAM/klm

I acknowledge and consent to the release of the escrowed funds by TransAmerica Title to Rhoades, McKee, Boer, Goodrich & Titta under the terms outlined above.

Dated: February 9, 1993

By: TERRY L. ZABEL
Terry Zabel, Internal Revenue Service, District Counsel

UNITED STATES COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. 1:93-CV-306
HON. GORDON J. QUIST

SANDRA L. CRAFT, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, ACTING THROUGH THE INTERNAL REVENUE SERVICE, DEFENDANT

PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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[4]

Statutes:

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Rules:

F.R.C.P. 56 [38]

[5]

ISSUES PRESENTED

I. WHETHER THE UNITED STATES' FEDERAL TAX LIEN ATTACHED TO THE TAXPAYER'S INTEREST IN REAL PROPERTY HELD IN A TENANCY BY THE ENTIRETIES PRIOR TO ITS CONVEYANCE TO THE PLAINTIFF?

ANSWER: No.

II. WHETHER THE UNITED STATES' FEDERAL TAX LIEN ATTACHED TO THE TAXPAYER'S INTEREST IN REAL PROPERTY HELD IN A TENANCY BY THE ENTIRETIES UPON ITS CONVEYANCE TO THE PLAINTIFF?

ANSWER: No.

[6]

PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary of Case

Plaintiffs concur with the United States' Motion in stating that the action before the Court is a civil action brought by Plaintiff Sandra L. Craft to quiet title to the proceeds from the sale of certain real property located at 2656 Berwyck Rd., S.E., Grand Rapids, Michigan, (hereinafter referred to as "Berwyck Property"), formerly owned by the Plaintiff and her husband Don Craft, as tenants by the entireties. Plaintiff would clarify the United States' analysis of the conveyance in question in that the copy of the Quit-claim deed involved more accurately reflects a conveyance by the owner, the husband and wife entity which held that property as tenants by the entireties, who then conveyed the real property to the Plaintiff. (See Govt. Exh. 3) Such a conveyance thereby terminated the former tenancy by the entireties in accordance with the statutory provisions of MCLA § 557.101.

Plaintiff does not dispute that the United States has a perfected Federal tax lien filed against the Plaintiff's husband for unpaid Federal income tax liabilities nor that the lien is perfected to the extent of any equity in property owned by Don Craft in Kent County as of the date of filing his individual Chapter 7 Bankruptcy petition, January 30, 1992. Plaintiff further agrees that pursuant to an escrow agreement reached between the Crafts and the Internal Revenue Service (IRS), the sale of the [7] subject property was allowed to be closed free

and clear of any tax liens with any existing Federal tax liens being transferred with the same right, title and interest to the proceeds from that sale as the lien may have had with respect to the property itself.

The terms of that agreement further provided that fifty percent (50%) of the net sales proceeds would be retained in an escrow account pending a resolution of this issue between the parties. However, that agreement contained no terms, expressly or impliedly, that indicated in any manner whatsoever that the other fifty percent of the net sales proceeds which were released to the Plaintiff were in any way in satisfaction of her interest. (Govt. Brf, fn 2, p2) The agreement further did not state, expressly or impliedly, that the Plaintiff's interest was claimed to only be fifty percent of the equity in a property which she had owned and which was titled exclusively in her name as fee simple owner for a period of over four years prior to the sale.

Statement of Facts

Plaintiff Sandra L. Craft concurs in the Statement of Facts #1 through #14 set forth in the United States' Motion for Partial Summary Judgment for purposes of the two motions currently before the Court. (Govt. Brf, p. 2-4) Plaintiff further stipulates to the validity of those documents attached as Exhibits to the United States' Motion and cited in its Statement of Facts for purposes of the Court's consideration of these two summary judgment motions only.

[8]

Legal Argument

A. Standard for Summary Judgment.

Summary judgment under Rule 56 is appropriate where no issue of material fact necessary to decide the matter on its merits remains contested and one party is entitled to judgment as a matter of law.

> "Summary judgment is appropriate only where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Atlas Concrete Pipe, Inc v. Roger J. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982), *see Willetts v. Ford Motor Co.*, 583 F.2d 852, 854 (6th Cir. 1978); *Felix v. Young*, 536 F.2d 1126, 1130 (6th Cir. 1976). The function of a motion for summary judgment is not to allow the court to decide issues of fact but rather to determine whether there is an issue of fact to be tried. *United States v. Articles of Device, Etc.*, 527 F.2d 1008, 1011 (6th Cir. 1976); *Aetna Ins. Co. v. Cooper, Wells & Co.*, 234 F.2d 342, 345 (6th Cir. 1956). The moving party bears the burden of clearly establishing the non-existence of any genuine issue of fact material to a judgment in his favor. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Articles*, 527 F.2d at 1011. In determining whether there are genuine issues of fact warranting a trial, the evidence will be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L.Ed.2d 176 (1962); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). If a disputed question of material fact remains, the motion for summary judgment must be denied. *Atlas*, 668 F.2d at 908; Felix, 536 F.2d at 1030; *Bohn*, 303 F.2d at 427."

> *FMB-First Michigan Bank v. Van Rhee*, 681 F. Supp. 1264, 1266 (W.D. Mich. 1987).

[9]

Plaintiff Sandra L. Craft asserts this matter is ripe for summary judgment since all the relevant dates, documents and facts necessary to decide the legal question at issue have now been submitted as exhibits to the United States' Motion for Summary Judgment or as exhibits to this brief.

B. Attachment of Federal Tax Lien to Tenancy by the Entireties Property.

The United States based its Motion for Summary Judgment on the proposition that the Federal tax lien of the Internal Revenue Service against Mr. Don Craft, attached to real property held as tenants by the entireties by the Plaintiff and Mr. Craft as husband and wife. The foundation of the United States' motion is based upon its interpretation of a 1975 change in Michigan statute and one case subsequent to that law's enactment. The position of the United States that its Federal tax lien attached to that property is in direct conflict with the specific holdings contained in current, controlling case law in the State of Michigan, the United States District for the Western District of Michigan, and the United States Sixth Circuit Court of Appeals.

The United States cites the Court to numerous cases for the proposition that while State law governs the question of what interest a taxpayer has in property, Federal law then controls the attachment of a Federal tax lien to that property. *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985); *United States v. Rodgers*, 461 U.S. 677 (1982); *Aquilino v. United States*, 363 U.S. 509, 513-514 (1960); *United States v. Bess*, 357 U.S. 51, 55 (1958).

[10]

The Plaintiff does not contest that legal principle or dispute the holdings so cited by the United States in those cases. The legal proposition cited only serves to clarify and focus the issue before the Court on this motion. The actual issue to be decided by the Court is whether or not the property interest held by one spouse in a tenancy by the entireties in Michigan has changed by statute or by case law to the point where that interest is now separate, divisible and distinct from any other property interest including that of his or her spouse. The Plaintiff asserts that voluminous case law suggests that is not the case.

The United States goes to great lengths to assert that the definition of the property interest held by an individual spouse in real property held in a tenancy by the entireties changed upon the enactment of the 1975 Public Act 288. The United States then cites this Court to the case of *Dow v. State of Michigan*, 396 Mich. 192 (1976) as proof of that statutory change. The interpretation of and reliance by the United States on that statutory enactment and the *Dow* case interpreting it are both erroneous and misplaced.

The statutory change to which the United States refers was the enactment of 1975 Public Act 288 which became law on December 10, 1975.

"Sec. 1. A husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety."

1975 Public Act 288.

This statutory provision which is now codified at MCLA § 557.71 or MSA § 26.201(1), originated as 1975 House Bill no. 4971. [11] Attached to this brief as Exhibit 1 are documents obtained from the Legislative Service Bureau at the Michigan Capital which track the original enactment of that statute.

Those documents attached include the act as originally proposed, the bill as enrolled, a page from the 1975 history of House bills, a page from the 1975 House Journal showing what language was deleted from the original proposed act, a page from the numerical indices listing the bills before the House by number and general topic, an interim status report on the bill providing some legislative history, and an analysis of the proposed act provided to the legislators by the Analysis Section of the House of Representatives Judiciary Committee. (Exhibit 1)

Numerous places within that package of legislative history indicate that that provision of Michigan statute was enacted simply to rectify historical sex discrimination and to equalize women's rights to property held by a tenancy by the entireties. For the United States to assert that this statute somehow creates separate,

divisible property interests in the husband and wife in property held as a tenancy by the entireties is contrary to the plain meaning of that statute as well as contradicted by the legislative history and intent at that time.

The United States also cites this Court to the *Dow* case for the assertion that Michigan law subsequent to that congressional enactment recognizes a severable and separate property interest in an entireties estate. (Govt. Brf, p. 12-13) That argument by the United States misreads the holding of *Dow v. State of Michigan.*

[12]

The Court in *Dow* decided what constituted sufficient notice to satisfy due process concerns in a situation where there was a State taking of property that was held in a tenancy by the entireties. *Dow*, 396 Mich. at 201-212. In a footnote to that decision, the *Dow* court cites MCLA § 557.71 for the proposition that whatever the law had been previously, each spouse in a tenancy by the entireties was now entitled to separate *notice* of an action by the State which would result in a taking of that property. *Dow*, 396 Mich. at 198, fn 10. No where in the *Dow* decision does that court redefine entireties property interests or use language that "recognizes severable and separate property interest." (Govt. Brf, p. 12)

The United States in the their brief asserts that the *Dow* court held that *each* spouse had significant property interest within protection of the due process clause and *each* spouse had a separate constitutionally protected property interest in entireties property.

(Govt. Brf, p.12) Footnote 19 of the *Dow* case stated that Due Process protects property interests and that those property interests are defined by state law. Nowhere in that footnote or in the case itself did the *Dow* court hold that each spouse had a *separate* property interest in entireties property. The free interchange by the United States of the terms "significant" and "separate" is both inaccurate and misleading.

The *Dow* decision deals with adequate notice in a due process context, it does not contain any holding that can be construed as redefining or recognizing separate, devisable property interests in Michigan tenancy by the entireties property. Equally significant [13] is that fact that in the 17 years subsequent to the *Dow* decision, not one Michigan case, or any case anywhere interpreting Michigan law, has cited *Dow* or even inferred that such a monumental change in Michigan real property law has now occurred.

The United States' Motion further cites the Court to two recent United States Supreme Court opinions in support of their argument that since Michigan now recognizes a separate, devisable property interest in tenancy by the entireties property that interest can therefore be attached by a Federal tax lien.

The United States cites this Court to *United States v. Rodgers*, 461 U.S. 677 (1982), in support of their argument by stating that a "homestead" right under Texas law is very similar to a tenancy by the entireties under Michigan law. (Govt. Brf, p. 9) The United States goes on to base that statement on the concept that both legal principles preclude one spouse from selling or abandoning the property without the consent

of the other, and both are protected from forced sale and the reach of most creditors. (Govt. Brf, p.9)

That assertion by the United States is refuted by the very case and footnote to which the United States cites this Court. Footnote 31 of the *U.S. v. Rodgers* decision contained the following language:

> "31
> . . . .
> . . . .
>
> Second, the dissent relies on a piece of 1954 legislative history concerning the application of the federal tax lien to interests in tenancies by the entirety. *Post*, at 719-720.

[14]

. . . .

> More important, tenancies by the entirety pose a problem quite distinct from that at issue in the case of homestead rights. See *Herndon v. United States*, 501 F.2d at 1220-1221; W. Plumb Federal Tax Liens 37-38 (3d ed. 1972). The basis holding of the line of cases mentioned by the dissent was, not merely that interests in a tenancy by the entirety could not be sold to satisfy a tax debt of one spouse, but that, as a result of the peculiar legal fiction governing tenancies by the entirety in some States, no tax lien could attach in the first place because neither spouse possessed an independent interest in the property.
>
> . . . .

> In the homestead context, by contrast, there is no doubt, even under state law, that not only do **both** spouses (*rather than neither*) have an independent interest in the homestead property, but that a federal tax lien can at least **attach** to each of those interests. See *Paddock v. Siemoneit*, 147 Tex. 571, 584-585 (1949). Thus, **if** the tenancy by the entirety cases are correct, they do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place." (bold emphasis in original).

United States v. Rodgers, 461 U.S. 677, 703 fn 31 (1982).

While not ruling on the validity of tenancy by the entireties characteristics, the Supreme Court clearly acknowledges that under Texas homestead law, a Federal tax lien can attach to the separate interest of each spouse whereas under tenancy by the entireties neither spouse has an independent interest in the property which would subject it to a Federal tax lien. *Rodgers*, 461 U.S. at 703, fn 31 (1982). The Plaintiff asserts that such a clearly enunciated distinction as stated by the U.S. Supreme Court should allow this Court regard the *Rodgers* case as support of her assertion that the Federal tax lien did *not* attach to property held by her and her husband as tenants by the entirety.

[15]

The motion of the United States places further reliance on the case of the *United States vs. National Bank of Commerce* for the proposition that the United

States Supreme Court has held that the IRS was entitled to levy against and seize a joint bank account of a husband and wife held as a tenancy by the entireties for tax debts of only one spouse. Plaintiff is unclear how the United States feels this case might be applicable since the controlling Michigan precedent both before and after *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971) which the United States now seeks to overturn is that Michigan does not recognize tenancies by the entirety in personal property except in very limited situations. *In the Matter of Jackson* (*Jackson v. Leitch*), 92 B.R. 211, 213-214 (Bankr. W.D. Mich. 1988); *In the Matter of Jones*, 31 B.R. 372, 376 (Bankr. E.D. Mich. 1983); *Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655 (1954).

The position of the United States that the Federal tax lien for the tax liabilities of Don Craft attached to the property held as tenancy by the entireties by Plaintiff and her husband, directly contradicts a long line of Michigan, U.S. District for the Western District of Michigan, and Sixth Circuit case law. The case of *Cole v. Cardoza* decided in 1971 by the U.S. Sixth Circuit was not the first, nor was it the most recent, Court to specifically hold that a Federal tax lien against a single spouse cannot attach to real property held as tenancy by the entireties in Michigan. That principal was long ago enunciated by two early Federal court cases in the State of Michigan, those being *Shaw v. United States*, 94 [16] F. Supp. 245, 246 (W.D. Mich. 1939) and *United States v. Nathanson*, 60 F. Supp. 193, 194 (E.D. Mich. 1945) as well as the Michigan case of *Sanford v. Bertrau*, 204 Mich. 244 (1918).

The motion by the United States suggests that somehow Michigan law has changed subsequent to the

enactment of 1975 Public Act 288 in December of 1975 and that *Cole v. Cardoza* is no longer valid law. This assertion by the United States ignores a vast progeny of Federal Court cases subsequent to 1975 which continue to hold unaltered the principle that a Federal tax lien for one spouse cannot attach to real property in the State of Michigan held as tenants by the entireties. In 1985, the U.S. Sixth Circuit held that in Michigan, "Tenants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. Neither husband or wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property. See *Sanford v. Bertrau*, 204 Mich. 244 (1918)." *In the Matter of Grosslight* (*Liberty State Bank and Trust v. Grosslight*), 757 F.2d 773, 775 (6th Cir. 1985).

Grosslight was cited approvingly by the U.S. Bankruptcy Court of the Western District of Michigan more recently which went on to state:

> "Under Michigan law, property held by tenancy by the entireties is exempt from the claims and execution of creditors of solely one spouse; however creditors which hold joint claims against both spouses may reach the entireties property notwithstanding is otherwise exempt status. *Sandford v. Bertrau*, 204 Mich 244, (1918). Entireties real property may be transferred or [17] encumbered only by a joint deed or joint mortgage executed by both spouses; jointly the spouses hold complete ownership of entireties property. Conversely, because *neither spouse holds a severable interest*, one spouse cannot unilaterally sever or convey entireties property absent consent by the other spouse. (cites omitted)" (emphasis added)

In the Matter of Wickstrom (*Lasich v. Estate of Wickstrom*), 113 B.R. 339, 346 (Bankr. W.D. Mich. 1990).

Another recent Sixth Circuit case cited by the United States clearly and unequivocally reaffirms the validity of the legal principal which the United States now seeks to overturn. In 1990, the U.S. Sixth Circuit stated:

"Under Michigan law, entireties property may be levied upon by the State for nonpayment of real estate taxes on the real property itself. *See Robbins v. Barron*, 32 Mich. 36 (1875). However, entireties property may not be attached to satisfy the personal tax liability of a single spouse. *Cole v. Cardoza*, 441 F.2d at 1343; *United States v. Nathanson*, 60 F. Supp. 193 (E.D. Mich. 1945)."

United States v. Certain Real Property located at 2525 Leroy Lane, 910 F.2d 343, 350 (6th Cir. 1990).

That case dealt with the ability of the United States to seize real property held in Michigan in a tenancy by the entireties using the Federal Drug Forfeiture laws which provide even greater powers to the United States than those accorded to it under the Internal Revenue Code.

After the case was remanded by the Sixth Circuit and subsequently appealed a second time, the Sixth Circuit in 1992 again reaffirmed that principle when it stated:

"As we stated in our prior opinion, the federal forfeiture statutes do not operate to destroy the fundamental characteristics given to real property [18] by the states. *See Certain Real Property*, 910 F.2d at 349. To allow the United States to step into

Mitchell Marks' place as a tenant by the entirety would destroy the tenancy by the entirety because the unities of time, title and person would be violated. The government did not and could not possess Mitchell Marks' present interest in the tenancy by the entirety. The government's interest come into being only when the tenancy by the entireties is destroyed either by death, divorce, or operation of Michigan law. When the tenancy by the entireties is destroyed, the government gets whatever Mitchell Marks possesses after the entireties estate is destroyed."

United States v. Certain Real Property located at 2525 Leroy Lane, 972 F.2d 136, 138 (6th Cir. 1992).

C. <u>Attachment of Federal Tax Lien to Tenancy by the Entiretires Property upon Conveyance</u>.

The United States argues in the alternative that even if the IRS tax lien did not attach to any interest of Don Craft in tenancy by the entireties property when it was filed, it attached at some "transitory moment" while being conveyed. (Govt. Brf, p. 19-12) The brief of the United States cites the Court to no statutory authority nor a single case in any jurisdiction to support this imaginative, but meritless concept. Unfortunately, such an inventive hypothesis is contradictory to the language of at least two controlling Sixth Circuit cases as well as Michigan statute governing the voluntary termination of tenancy by the entireties.

As previously quoted, the Sixth Circuit has held that the government is only entitled to whatever interest is possessed by the spouse against whom they have a claim *after* the entireties estate is destroyed. *U.S. v. Certain Real Property at 2525 Leroy Lane*, 972 F.2d

136, 138 (6th Cir. 1992). The tenancy by the [19] entireties in the case before the Court was destroyed by operation of law when the tenancy was terminated in accordance with the provisions of MCLA § 557.101 as shown on Government Exhibit 3.

Such a concept does further violence to the holding of *Cole v. Cardoza* which held that such a lien for taxes of one spouse filed against Michigan real property held as tenants by the entirety is a nullity, is without legal effect and is null and void as to the property. *Cole v. Cardoza*, 441 F.2d 1337, 1343-1344 (6th Cir. 1971). The Court in *Cole* omitted only language which could even be inferred to indicate an ability for a federal tax lien to remain dormant or inchoate until such time as a transfer at which time it would spring to life.

The United States concludes by attempting to analogize the Craft situation to either after–acquired property or a circumstance attempts to renounce some asset *prior* to a federal tax lien attaching. It would seem to be without argument that a theory approximating attachment to after-acquired property is not applicable here because Don Craft could not possibly have owned or possessed *more* of an interest *after* he and his wife conveyed away the property, than Don Craft may have had before they conveyed the property. After the conveyance, Don Craft had no claim whatsoever to the Berwyck property. Before the conveyance, Michigan law states that Don Craft had no separate, divisible property interest in the entireties property.

The proposition that the Craft circumstances are analogous to a taxpayer who renounces some expectation of receiving an asset due [20] to a federal tax lien is similarly inapplicable. Don and Sandra Craft purchased

the property in question as tenants by the entirety in May of 1972, *seventeen years* prior to the United States filing a tax lien against Don Craft, and eight years before the first year for which Don Craft was assessed tax liability for by the IRS on substituted returns. His conveyance can hardly be viewed as a renouncement taken to avoid the future attachment of a tax lien to an asset which he did not own at the time.

D. <u>Interest Conveyed by Don Craft</u>.

The amount of valuation of any property interest to which Don Craft might have been entitled is not properly before this Court as part of either of the pending Motions for Summary Judgment. The United States cites the Court to Michigan statute and a Michigan Bankruptcy case to establish that if any attachable interest was conveyed by Don Craft, it amounted to 50% of the net proceeds from the sale of the house. (Govt. Brf, p. 21) Both MCLA § 552.102 and the case of *In the Matter of Ignasiak*, 22 B.R. 828 (Bankr. E.D. Mich. 1982) not only create only a presumption of an equal division of the property, they do so in the context of a divorce. Plaintiff took exclusive title to the Berwyck property after she and her husband terminated the tenancy in accordance with the provisions of MCLA § 557.101 which has nothing to do with a Court-ordered division of property incident to a divorce. Plaintiff further reserves the right to contest that presumption, if the Court finds it applicable, to present such factual evidence as is appropriate [21] in making that determination such as who paid the mortgage, who maintained the property in liveable fashion, who paid the property taxes, etc. *United States v. Certain Real Property Located at 2525 Leroy Lane*, 972 F.2d 136, 139 (6th Cir. 1992).

Conclusion

There has been no change in Michigan law which has the effect of now recognizing by statute separate, divisible property interests in each spouse in a tenancy by the entireties. There also has been no Michigan case, nor any federal case interpreting Michigan law, which interprets MCLA § 557.71 as creating separate, divisible property interests in tenants by the entireties. State law defining what property interest is possessed by a tenant in an entireties estate has not materially changed since the Holding in *Cole v. Cardoza*. Since state law determines what property interest exists that would be available for attachment by a federal tax lien, the tax lien for Don Craft's tax liabilities did not attach to the Berwyck property while held in a tenancy by the entireties.

There is no Michigan statute, no Michigan case law, or case law anywhere interpreting Michigan law, which stands for the proposition that when tenancy by the entireties property is transferred it becomes a tenancy in common "for a transitory moment." The federal tax lien for Don Craft's tax liabilities did not attach to the Berwyck property during any "transitory moment" when the tenancy was terminated in accordance with Michigan law and the property became titled in the Plaintiff's name.

[22]

There is no issue of material fact remaining which would prevent this Court from entering Summary Judgment on the issues of whether the federal tax lien solely for the liabilities of Don Craft attached to the property held by the Plaintiff and her husband as tenants by the entirety upon its filing, or subsequently

upon the property's conveyance to the Plaintiff. The Plaintiff is therefore entitled to judgment as a matter of law and respectfully requests this Court enter Summary Judgment against the United States on both issues.

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[Exhibit omitted]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:93 CV 306
HON. GORDON J. QUIST

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH
THE INTERNAL REVENUE SERVICE, DEFENDANT

Filed: [Dec. 1, 1998]

JOINT FINAL PRETRIAL ORDER

A final pre-trial conference was held on the 30th day of November, 1998, at 11:00 a.m. Appearing were:

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1. Exhibits: The following exhibits will be offered by the plaintiff and the defendants:

Exhibits of Plaintiff Sandra L. Craft

Exhibits of Defendant United States of America

a. Warranty Deed dated 5/26/72;
b. Mortgage dated on or about 5/26/72;
c. Referral Report for Potential Fraud Cases dated 10/16/87, with attachments;
d. Notice of Federal Tax Lien dated 3/30/89;
e. Quit Claim Deed dated 8/28/89;
f. Bankruptcy Petition by Don Craft dated 1/30/92, with supporting schedules;
g. Letter dated 1/21/93 regarding escrow of funds;
h. Letter dated 8/6/92 from Donald Craft to IRS;
I. Affidavit of Donald Craft;
j. Affidavit of Sandra L. Craft;
k. NBD Statement of Mortgage Account dated 12/31/86;
l. NBD Mortgage Statements dated 12/31/89; 12/31/90; 12/30/91 and 6/23/82, for loan number 658781-0;
m. Letter dated November 19, 1998, from Charlene S. Veenstra, Deputy Treasurer for City of East Grand Rapids;
n. Letter dated 5/17/95 from Matthew Woolford, City Assessor for City of East Grand Rapids;
o. U.S. Requests for Admission.
p. 1977 Certificate of Assessments and Payments for Don and Sandra Craft;
q. 1978 Certificate of Assessments and Payments for Don and Sandra Craft;
r. 1979 Certificate of Assessments and Payments for Don Craft;

s. 1980 Certificate of Assessments and Payments for Don Craft;

t. 1981 Certificate of Assessments and Payments for Don Craft;

u. 1982 Certificate of Assessments and Payments for Don Craft;

v. 1983 Certificate of Assessments and Payments for Don Craft;

w. 1984 Certificate of Assessments and Payments for Don Craft;

x. 1985 Certificate of Assessments and Payments for Don Craft;

y. 1986 Certificate of Assessments and Payments for Don Craft;

z. 1987 Certificate of Assessments and Payments for Don Craft;

aa. 1988 Certificate of Assessments and Payments for Don Craft;

bb. 1989 Certificate of Assessments and Payments for Don Craft;

cc. 1990 Certificate of Assessments and Payments for Don Craft;

dd. 1991 Certificate of Assessments and Payments for Don Craft;

ee. 1993 Certificate of Assessments and Payments for Don Craft;

ff. 1979 Certificate of Assessments and Payment for Sandra Craft;

gg. 1980 Certificate of Assessments and Payments for Sandra Craft;

hh. 1981 Certificate of Assessments and Payments for Sandra Craft;

ii. 1982 Certificate of Assessments and Payments for Sandra Craft;

jj. 1983 Certificate of Assessments and Payments for Sandra Craft;

kk. 1984 Certificate of Assessments and Payments for Sandra Craft;

ll. 1985 Certificate of Assessments and Payments for Sandra Craft;

mm. 1986 Certificate of Assessments and Payments for Sandra Craft;

nn. 1987 Certificate of Assessments and Payments for Sandra Craft;

oo. 1988 Certificate of Assessments and Payments for Sandra Craft;

pp. 1989 Certificate of Assessments and Payments for Sandra Craft;

qq. 1990 Certificate of Assessments and Payments for Sandra Craft;

rr. 1991 Certificate of Assessments and Payments for Sandra Craft;

ss. 1992 Certificate of Assessments and Payments for Sandra Craft;

tt. 1980, Form 1040 for Sandra Craft;

uu. 1981, Form 1040 for Sandra Craft;

vv. 1982, Form 1040 for Sandra Craft;

ww. 1983, Form 1040 for Sandra Craft;

xx. 1984, Form 1040 for Sandra Craft;

yy. 1985, Form 1040 for Sandra Craft;

2. Uncontroverted Facts: The parties have agreed that the following may be accepted as established facts:

1. Don R. Craft and his wife Sandra Craft purchased the Berwyck property as tenants by the entireties on May 26, 1972;

2. Don R. Craft had been a practicing attorney in Grand Rapids for a substantial period of time;

3. In 1992 , upon the sale of the Berwyck property Don and Sandra Craft moved to Alabama;

4. Don R. Craft failed to timely file federal income tax returns for his taxable years 1979 through 1987;

5. The Internal Revenue Service prepared substitute § 6020(b) federal income tax returns for Don R. Craft for the tax years 1979 through 1986;

6. Don R. Craft incurred tax liabilities for the taxable years 1979 through 1987 in the amount of $482,446.73;

7. These tax liabilities were assessed, with notice and demand duly given, in 1988;

8. A Notice of Federal Tax Lien with respect to these liabilities was recorded with the Kent County Register of Deeds on April 7, 1989;

9. On August 28, 1989, Don R. Craft and Sandra Craft quit claimed their interest in the Berwyck property to Sandra Craft for $1.00;

10. Don R. Craft filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 30, 1992;

11. On June 1, 1992, the Bankruptcy Court entered an order of discharge;

12. On June 11, 1992, the Bankruptcy case was closed;

13. Don and Sandra Craft entered into an agreement with the IRS under which the Berwyck property was sold free and clear of the federal tax liens against Don Craft, and 50% of the net proceed were retained in escrow subject to the same right title and interest that the federal tax lien had in the property;

13. The balance of the net sales proceeds from the sale of the Berwyck property have been distributed to the plaintiff;

14. No event of any legal significance affecting the title or claim to the property occurred at any time between August 28, 1989, and the sale of the property in June of 1992, which would otherwise disturb the United States' claim or title to the interest of Don Craft in the property [U.S. First Request for Admissions, Req. No. 1, Govt. Ex. 1; Plaintiff's Motion to Refer Case to Bankruptcy Court. ¶7];

15. Sandra Craft does not have any claim against any interest Don Craft had in the Berwyck Property from August 28, 1989, through June of 1992 [U.S. First Request for Admissions, Req. No. 2, Govt. Ex. 1];

16. Sandra L. Craft does not have any claim against any interest Don Craft had in the Berwyck Property from August 28, 1989 through June of 1992, which has priority over

the United States' prior perfected federal tax lien [U.S. First Request for Admissions, Req. No. 3, Govt. Ex. 1];

17. Sandra L. Craft did not claim the property tax or the mortgage interest payments for the Berwyck property as deductions for the years 1979, 1980, 1981, 1982, 1983, 1984 and 1985;

18. Sandra L. Craft claimed the property tax or the mortgage interest payments for the Berwyck property as deductions for the years 1986, 1987, 1988, 1989, 1990, 1991 and 1992;

3. Controverted and Unresolved Issues: The factual issues remaining to be determined and issues of law for the Court's determination are:

1. Whether the quit claim conveyance out of entireties on August 28, 1989, was a fraudulent in fact;

2. Whether the conveyance out of entireties was part of scheme to avoid the United States' lien upon the sale of the Berwyck property;

3. Whether the quit claim conveyance out of entireties on August 28, 1989, was fraudulent in law;

4. Whether Don Craft was insolvent prior to his conveyance of the property out of tenancy by the entireties to his wife on August 28, 1989;

5. Whether fair consideration was given to Don Craft for his conveyance on August 28, 1989, to the plaintiff;

6. Whether from 1979 through 1985 Don Craft made fraudulent conveyances into the tenancy by the entireties;

7. Whether Don Craft contributed about $38,000.00 into the tenancy by entirety from 1979 through 1985 in the form of property tax and mortgage payments;

8. Whether Don Craft insolvent from 1979 through 1985, while he was making contributions to or for the benefit of the tenancy by the entirety.

4. Witnesses: Non-expert witnesses to be called by the plaintiff and defendant, except those who may be called for impeachment purposes only, are:

Non-Expert Witnesses of the Plaintiff Sandra L. Craft

1.

Non-Expert Witnesses of the Defendant United States of America

1. Sandra L. Craft
2. Rosie Wilson, Revenue Agent
3. Charlene S. Veenstra, Deputy Treasurer City of East Grand Rapids, Michigan
4. Sue Ann Symons, IRS Special Advisor
5. Representative for National Bank of Detroit;
6. All custodians of records introduced as exhibits;
7. All witnesses listed by plaintiff.

It is understood that, except upon a showing of good cause, no witness whose name does not appear herein

shall be permitted to testify over objection for any purpose except impeachment.

5. **Depositions and Other Discovery Documents:** All depositions, answers to written interrogatories, and requests for admissions, or portions thereof, which are expected to be offered in evidence by the parties are:

Defendant United States:

The United States expects to offer in evidence the following admissions by Sandra L. Craft:

1. That no event of any legal significance affecting the title or claim to the property occurred at any time between August 28, 1989, and the sale of the property in June of 1992, which would otherwise disturb claim or title to the interest of Don Craft in the property [U.S. First Request for Admissions, Req. No. 1 Govt. Ex. 1; Plaintiff's Motion to Refer Case to Bankruptcy Court, ¶7];
2. That Sandra Craft does not have any claim against any interest Don Craft had in the Berwyck Property from August 28, 1989 through June of 1992 [U.S. First Request for Admissions, Req. No. 2, Govt. Ex. 1];
3. That Sandra L. Craft does not have any claim against any interest Don Craft had in the Berwyck Property from August 28, 1989 through June of 1992, which has priority over the United States' prior perfected federal tax lien [U.S. First Request for Admissions, Req. No. 3, Govt. Ex. 1];

6. **Length of Trial:** Counsel estimate the trial will consume 2 days.

7. **Prospects of Settlement:** Counsel for the parties have discussed settlement, but settlement is unlikely insofar as the parties are divided by a number of procedural issues and the United States seeks to reach a final determination of its remedy within the context of an alleged fraudulent conveyance of entireties property.

8. **Damages:** The United States seeks an award of 50% of the net sales proceeds.

FOR DEFENDANT UNITED STATES OF AMERICA
/s/ JOHN A. LINDQUIST
JOHN A. LINDQUIST
Trial Attorney
U.S. Department of Justice
P.O. Box 55
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6561

FOR PLAINTIFF SANDRA L. CRAFT
/s/ JEFF A. MOYER
Jeff A. Moyer, Esquire
Donovan, Love & Twinney P.L.C.
509 Waters Building
161 Ottawa Ave., N.W.
Grand Rapids, Michigan 49503
Telephone: 616/454-1900

IT IS SO ORDERED THIS
1st day of December, 1998. /s/ GORDON J. QUIST
HON. GORDON J. QUIST
U.S. District Court

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. 1:93-CV-306

SANDRA L. CRAFT, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ACTING THROUGH
THE INTERNAL REVENUE SERVICE, DEFENDANT

Filed: Apr. 23, 1993]

COMPLAINT TO QUIET TITLE

NOW COMES the Plaintiff, Sandra L. Craft, by and through her attorneys Rhoades, McKee, Boer, Goodrich & Titta, and files this action against the United States to quiet title to certain real property or the proceeds thereof and in support of this action states the following:

1. The Plaintiff, Sandra L. Craft, is a resident of Birmingham, Alabama.

2. The Defendant, The United States of America, acting through the Internal Revenue Service, conducts business in Kent County, Michigan.

3. Plaintiff Sandra L. Craft and her husband Don R. Craft were Michigan residents formerly residing at 2656 Berwyck Rd., S.E., Grand Rapids, Michigan.

4. Plaintiff has standing and statutory authority to commence this action against the United States of America pursuant to 28 U.S.C. § 2410(a)(1), Actions Affecting Property in Which the United States has a Lien.

5. The Court has jurisdiction to hear and decide this action under provisions of 28 U.S.C. § 1346.

6. The subject of this litigation are the proceeds of the sale of certain real property formerly owned by the Plaintiff located at 2656 Berwyck Rd., S.E., and located in Kent County, Michigan.

7. The proceeds from the June 1992 sale of that real property are currently being held in escrow by agents of TransAmerica Title Insurance Company located at 921 South Division, Grand Rapids, Michigan. (Exhibits A, B, C)

8. Plaintiff Sandra L. Craft and her husband Don R. Craft purchased the subject real property on May 26, 1972 and owned the subject property in a tenancy by the entireties through and including March 30, 1989. (Exhibits D, E)

9. The Defendant United States of America acting through the Internal Revenue Service filed a Notice of Federal Tax Lien Form 668(Y) with the Kent County Register of Deeds on March 30, 1989 based on unpaid taxes assessed solely against Don R. Craft. (Exhibit F)

10. The subject real property was owned by Sandra L. Craft and Don R. Craft as tenancy by the entireties property at the time the Federal tax lien was filed, and remained so until any interest of Don R. Craft was subsequently transferred by Mr. and Mrs. Craft to Sandra L. Craft on August 28, 1989. (Exhibits D, E) Don R. Craft no longer maintained, asserted or claimed

any interest in the subject real property after August 28, 1989.

11. Don R. Craft filed an individual Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Western District of Michigan on January 30, 1992, titled Case No. 92-80551. (Exhibit G)

12. Don R. Craft was granted a discharge by the U.S. Bankruptcy Court of all his dischargeable debts on June 1, 1992. (Exhibit H)

13. Don R. Craft's Chapter 7 Bankruptcy was subsequently closed by the Bankruptcy Court on June 11, 1992.

14. Don R. Craft subsequently moved the U.S. Bankruptcy Court on August 14, 1992 to reopen his Chapter 7 Bankruptcy to accord relief to the Debtor which was granted by order of the U.S. Bankruptcy Court on October 7, 1992. (Exhibits I, J)

15. Don R. Craft also filed Adversary Proceeding No. 92-8542 against the United States of America acting through the Internal Revenue Service seeking to avoid the tax lien against the subject real property on August 14, 1992. (Exhibit K)

16. That Adversary Proceeding was subsequently resolved and withdrawn based on lack of jurisdiction by the Bankruptcy Court over the subject real property with the simultaneous entry by the Court on January 27, 1993 of a consent judgment. That consent judgment stipulated that Don R. Craft had been discharged of all personal liability for personal income taxes with the exception of those taxes listed as priority debts on his Bankruptcy Petition ($10,300) and an additional amount of $2,109 representing the value of Don R. Craft's

personal property to which the IRS was acknowledged to be a secured party. (Exhibit L)

17. The sale of the subject real property was conducted in escrow and one-half of the net proceeds have been released to Mrs. Sandra L. Craft representing what both parties acknowledge to be an amount to which it is undisputed that the IRS had no claim. The remaining one-half of the net proceeds of this sale are currently being held in escrow by agents of Trans-America Title Insurance Company. (Exhibit C)

18. The United States acting through the Internal Revenue Service continues to assert that its lien attaches or attached to one-half of the proceeds of the sale of that real property despite clear and unequivocal language to the contrary in case law representing the controlling precedent in this Circuit.

WHEREFORE, Plaintiff Sandra L. Craft prays that this Court order the following relief:

(1) That the Notice of Federal Tax Lien filed against the subject real property on March 30, 1989 did not attach and be declared null and void;

(2) That the Defendant be ordered to issue a Certificate of Release with a disclaimer stating that the Notice of Federal Tax Lien does not attach to property of Plaintiff Sandra L. Craft;

(3) That it is hereby adjudged and ordered that the Defendant, the United States of America acting through the Internal Revenue Service has no right, title or interest in or to the proceeds of the Plaintiff's property;

(4) That the Plaintiff be awarded costs and expenses incurred as a result of the Plaintiff being forced to institute this action; and

(5) That TransAmerica Title Insurance Company or its agents be hereby ordered to release to the Plaintiff those proceeds currently being held in escrow and any such other or further equitable relief as this Court deems just and proper.

I declare that the statements above are true to the best of my knowledge and belief.

Dated: March 10, 1993 /s/ SANDRA L. CRAFT
SANDRA L. CRAFT

RHOADES, MCKEE, BOER,
GOODRICH & TITTA
Attorneys for Plaintiff

Dated: April 22, 1993 By: JEFF MOYER
JEFF A. MOYER (P44671)
Business address:
600 Waters Building
Grand Rapids, MI 49503
(616) 235-3500

[EXHIBIT A]

RHOADES, MCKEE, BOER, GOODRICH & TITTA
ATTORNEYS AT LAW

161 OTTAWA AVENUE N.W., SUITE 600
GRAND RAPIDS, MICHIGAN 49503-2793
TELEPHONE (616) 235-3500
FAX (616) 459-5102

OF COUNSEL
JEAN MCKEE
CHARLES T. ZIMMERMAN
ROBERT F. WILLIAMS
ROBERT J. DE BOER

AFFILIATED OFFICES
DE FRANCESCO & DE FRANCESCO
ST. JOSEPH, MI & NEW BUFFALO, MI

[NAMES OMITTED]

December 28, 1992

Ms. Diane Chiles
TRANSAMERICA TITLE
921 North Division
Grand Rapids, Michigan 49503

Re: Sandra Craft Escrow Account

Dear Ms. Chiles:

This letter is to confirm our conversation on December 23, 1992 with respect to the funds being held in escrow for Mrs. Sandra Craft by TransAmerica Title Insurance Company. At this time, this office is proceedings with litigation in Federal Bankruptcy Court to force the Internal Revenue Service to release their lien

against the house and accordingly against the funds of Sandra Craft. Since certain facts in this case are somewhat unique, the Internal Revenue Service seems to be taking a posture that it will try this case at however many levels are necessary to not only win but set a precedent for future situations of this type.

It is therefore necessary that this escrow account be continued until this litigation is concluded one way or the other. As a concession to the probable duration of the litigation, we think we have a tentative agreement with the Internal Revenue Service to split the escrowed funds into two portions, one which would represent Sandra Craft's share if Don still owned part of the house, and the other portion would represent Don's share if he still owned part of the house. The Internal Revenue Service has made overtures that it might be willing to release that half belonging to Sandra Craft to her and simply retain the half asserted to belong to Don Craft in an interest-drawing escrow account until the litigation is completed. As soon as that arrangement can be ironed out and put in writing, we will certainly be in touch with your office not only to release one-half of the amount you are presently holding to Sandra Craft, but also to set up a separate escrow account in Don Craft's name at your office or elsewhere if necessary. Mr. and Mrs. Craft and this office sincerely appreciate your cooperation and understanding in assisting them in getting this matter completed as quickly and efficiently as possible.

Finally, if either yourself, your supervisors or any outside personnel such as auditors have any questions

on what the status of the resolution of this matter is, please have them contact this office at your convenience.

Very truly yours,

RHOADES, MCKEE, BOER, GOODRICH & TITTA

/s/ JEFF MOYER
JEFF A. MOYER

JAM/klm

cc: Don Craft

[EXHIBIT B]

RHOADES, MCKEE, BOER, GOODRICH & TITTA
ATTORNEYS AT LAW

161 OTTAWA AVENUE N.W., SUITE 600
GRAND RAPIDS, MICHIGAN 49503-2793
TELEPHONE (616) 235-3500
FAX (616) 459-5102

OF COUNSEL
JEAN MCKEE
CHARLES T. ZIMMERMAN
ROBERT F. WILLIAMS
ROBERT J. DE BOER

AFFILIATED OFFICES
DE FRANCESCO & DE FRANCESCO
ST. JOSEPH, MI & NEW BUFFALO, MI

[NAMES OMITTED]

January 21, 1993

Ms. Diane Chiles
TRANSAMERICA TITLE
921 North Division
Grand Rapids, Michigan 49503

Re: Sandra Craft and Don Craft Escrowed Funds

Dear Ms. Chiles:

This letter should serve as sufficient documentation and authority for TransAmerica Title to release the full amount of $119,888.20 currently being escrowed in the name of Sandra Craft to the law firm of Rhoades, McKee, Boer, Goodrich & Titta. The release of these funds is with the knowledge and consent of the Internal

Revenue Service with the understanding that upon receipt of those funds, the law firm of Rhoades, McKee, Boer, Goodrich & Titta will disburse one-half of those funds to Mrs. Sandra Craft as the Internal Revenue Service has no claim against her share of those funds. The remaining one-half, or $59,944.10 will be placed in an interest bearing account at the law firm of Rhoades, McKee, Boer, Goodrich & Titta until such time as a resolution of the tax lien dispute is reached and an agreement is signed by both the Internal Revenue Service and representatives of Don Craft or until ordered to release those funds by an appropriate court order.

The signatures listed below should serve as sufficient authority for TransAmerica Title to release those funds to Rhoades, McKee, Boer, Goodrich & Titta. The Crafts thank you for your time, cooperation and understanding in holding those funds in escrow for them until now.

Very truly yours,

RHOADES, MCKEE, BOER, GOODRICH & TITTA

/s/ JEFF MOYER
JEFF A. MOYER
Attorneys for Sandra and
Don Craft

JAM/klm

I acknowledge and consent to the release of the escrowed funds by TransAmerica Title to Rhoades, McKee, Boer, Goodrich & Titta under the terms outlined above.

Dated: February 9, 1993 By: TERRY ZABEL
TERRY ZABEL, Internal Revenue Service, District Counsel

[EXHIBIT C]

921 North Division Avenue
Grand Rapids, MI 49503
Telephone 616-459-2400
Fax 616-459-0637

TRANSAMERICA
TITLE INSURANCE COMPANY

February 12, 1993

Mr. Jeff Moyer
Rhoades, McKee, Boer et al
161 Ottawa NW, Suite 600
Grand Rapids, MI 49503

Re: Sandra and Donald Craft

Dear Mr. Moyer:

I have studied your proposal regarding the transfer of funds from Transamerica to your firm.

Inasmuch as the Internal Revenue Service has agreed with the assertion that Mrs. Crafts' assumed 50% share of the proceeds is not subject to the tax lien, we are enclosing our check for those funds. You will note that the check is jointly payable to your firm and Sandra Craft.

Unfortunately, I fail to understand how the transfer of the remaining funds to your firm eliminates Transamerica's liability for the tax lien insofar as Mr. & Mrs. Witt and First Federal of Michigan are concerned. Only a "point blank" release or statement by the IRS or favorable court proceedings can eliminate the effect of the tax lien upon the property we agreed to insure without exception to that tax lien. Until such an

elimination can be obtained, sound business judgement dictates that Transamerica must retain the asset to offset the liability.

For the benefit of your client, we would be willing to invest those funds in an interest-bearing account. Keep in mind that any interest earned would remain in the account until resolution of the matter. Diane Chiles would be most happy to work out the details of the account with you or your client.

Very truly yours,

/s/ MONTE RELNERT
MONTE RELNERT
Manager

Encl.

MLR/js

[Seal Omitted]

77

COUNTY TREASURER'S
TAX CERTIFICATE ON DEED
DATED

LIBER 2120 PAGE 1186

This Indenture, made on 26th day of May in the year one thousand nine hundred and seventy-two

LEE R. ALBERT and wife, SARA ALBERT
3748 Berwyck Rd., S.E., Grand Rapids, Michigan

parties of the first part

AND DON R. CRAFT and wife, SANDRA LEE CRAFT
3816 Berwyck Rd., S.E., East Grand Rapids, Michigan

(mailing address)

parties of the second part

Witnesseth, That the said part ies of the first part, for and in consideration of the sum of

Forty-eight Thousand and No/100ths ($48,000.00) Dollars,

to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents, grant, bargain, sell, convey, release, alien and confirm unto the said parties of the second part, and their heirs and the survivor of the parties of the second part, his or her heirs or assigns, FOREVER, all that parcel of land situate and being in the City of East Grand Kapids County of Kent, and State of Michigan, and described as follows to-wit:

Lot 91, Albert-Realtors Hampshire Replat, as recorded in Liber 55 of Plats, Pages 8 and 9, Kent County, Michigan.

Tax Certificate as required by Sec. 131, Act No. 154, Public Acts of 1921 duly processed (State nonresident, Section

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining. To have and To hold the said premises, as herein described, with the appurtenances, unto the said parties of the second part, and to their heirs and the survivor of the parties of the second part, his or her heirs or assigns, FOREVER. And the said

LEE R. ALBERT and wife, SARA ALBERT

for themselves, their heirs, executors, and administrators, do covenant, grant, bargain and agree to and with the parties of the second part, their heirs, and the survivor of the parties of the second part, his or her heirs or assigns, that at the time of the ensealing and delivery of these presents they are well seized of the above granted premises in Fee Simple, and that they are free from all incumbrances whatever,

and that they will and their heirs, executors, and administrators shall Warrant and Defend the same against all lawful claims whatsoever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seal s the day and year first above written.

Signed, Sealed and Delivered in Presence of

Herman H. Reyer

Donna J. Avery

Lee R. Albert

Sara Albert

STATE OF MICHIGAN, } ss.
County of Kent }

On this 26th day of May in the year one thousand nine hundred and seventy-two before me, a Notary Public in and for said County personally appeared LEE R. ALBERT and wife, SARA ALBERT to me known to be the same person s described in and who executed the within instrument, and they severally acknowledged the same to be their free act and deed.

Donna J. Avery, Notary Public, Kent County, Michigan.
My commission expires August 10, 1974

Donald F. Oosterhouse
Attorney at Law
918 Union Bank Building
Grand Rapids, Michigan - 49503

MAIL TAX BILL TO GRANTEE: Same

STATE OF MICHIGAN REAL ESTATE TRANSFER TAX
Dept. MAY 30 $5.50

Kent County Register of Deeds Office

EXHIBIT D

23 AUG 89

78

Cb

QUIT CLAIM DEED—Statutory

LIBER 2660 PG 7

The Grantor(s)
Don R. Craft and wife, Sandra Lee Craft, whose address is 2656 Berwyck Rd., S.E. East Grand Rapids, Michigan
quit-claim(s) to
Sandra Lee Craft
whose address is
2656 Berwyck Rd., S.E. East Grand Rapids, MI
the following described premises situated in the City of Grand Rapids, County of Kent and State of Michigan.
Lot 78, Albert-Realtors Hampshire Replat, as recorded in Liber 55 of Plats, Pages 8 and 9, Kent County, Michigan.

for the sum of $1.00 This conveyance is exempt from transfer tax pursuant to MSA 7.456(5)(L)
Dated this 28th day of August, 19 89

* Edward B. Goodrich

* Diane K. Barr

* Don R. Craft

* Sandra Lee Craft

STATE OF MICHIGAN,
COUNTY OF Kent } ss.

The foregoing instrument was acknowledged before me this 28th day of August, 1989, by Don R. Craft and Sandra Lee Craft.

* Edward B. Goodrich
Notary Public, Kent County, Michigan
EDWARD B. GOODRICH Notary Public, Kent County, MI
My commission expires Dec. 2, 1991

When Recorded Return To:
Edward B. Goodrich
(Name)
600 Waters Building
(Street address)
Grand Rapids, MI 49503
(City and State)

Send Subsequent Tax Bills To:
Sandra Lee Craft
2656 Berwyck Rd., S.E.
Grand Rapid, Michigan
49506

Drafted By:
Edward B. Goodrich
Business Address:
600 Waters Building
Grand Rapids, MI
49503

Tax Parcel #_____ Recording Fee _____ Transfer Tax _____

* TYPE OR PRINT NAMES UNDER SIGNATURES

EXHIBIT
E

668(Y)
(December 1985)

Department of the Treasury / Internal Revenue Service

Notice of Federal Tax Lien Under Internal Revenue Laws

District
DETROIT

Serial Number
L 89006827 3712

For Optional Use by Recording Office

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of the liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer DON R CRAFT

Residence
2656 BERWYCK SE
GRAND RAPIDS MI 49506

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/79	521-42-0169	07/28/88	08/27/94	166108.26
1040	12/31/80	521-42-0169	07/28/88	08/27/94	86588.76
1040	12/31/81	521-42-0169	07/28/88	08/27/94	41523.23
1040	12/31/82	521-42-0169	12/26/88	01/25/95	61602.70
1040	12/31/83	521-42-0169	07/28/88	08/27/94	20739.93
1040	12/31/84	521-42-0169	07/28/88	08/27/94	32660.62
1040	12/31/85	521-42-0169	07/28/88	08/27/94	31494.93
1040	12/31/87	521-42-0169	07/28/88	08/27/94	10890.97
1040	12/31/87	521-42-0169	06/06/88	07/06/94	2837.33
				Total	$ 482446.73

Place of Filing
KENT CNTY REG OF DEEDS GRAND RAPIDS, MI

This notice was prepared and signed at DETROIT, MICHIGAN, on this,

30 day of MARCH, 19 94

Signature
P. CRICHTON, CD

Title
CHIEF, ADVISORY UNIT

EXHIBIT 1 F

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien Rev. Rul. 71-466, 1971 - 2 C.B. 409)

Form 668(Y) (Rev. 12-85)

United States Bankruptcy Court — VOLUNTARY PETITION
WESTERN DISTRICT OF MICHIGAN

'NG 92-80551

IN RE
Don R. Craft FEE PAID
ALL OTHER NAMES

SSN/TAX ID.
521-42-0169 521-42-0169
STREET ADDRESS OF DEBTOR
2656 Berwyck Rd SE
Grand Rapids, MI 49506

COUNTY OF RESIDENCE
Kent
MAILING ADDRESS OF DEBTOR
2656 Berwyck Rd SE
Grand Rapids, MI 49506

VENUE
Debtor has had a residence within this district for the preceding 180 days.

INFORMATION REGARDING DEBTOR
Type of debtor: Individual, married, and living together Chapter: 7
Nature of debt: CONSUMER Filing fee: ATTACHED

STATISTICAL INFORMATION
After excluding exempt property and paying administrative expenses, NO funds will be available for distribution to unsecured creditors.
(Estimated figures)

Number of creditors:	8
Assets:	25,609.00
Liabilities:	575,473.03

ATTORNEY NAME AND ADDRESS
Jeff A. Moyer
P44671
600 Waters Bldg.
Grand Rapids, MI 49503

(616) 235-3500
Other Attorneys

COURT USE ONLY

RELIEF ORDERED

EXHIBIT
G

---------- PRIOR BANKRUPTCY CASES FILED WITHIN LAST 6 YEARS ----------

NONE

--- PENDING BANKRUPTCY CASE FILED BY SPOUSE, PARTNER, OR AFFILIATE ---

NONE

---------- REQUEST FOR RELIEF ----------

Debtor requests relief in accordance with the chapter of title 11 United States Code specified in this petition.

---------- SIGNATURES ----------

Jeff A. Moyer
P44671

Date: 1/30/92

I declare under penalty of perjury that the information provided in this petition is true and correct.

Don R. Craft

Date: 1/30/92

I am aware that I may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under such chapter, and choose to proceed under chapter 7 of such title.

Exhibit B has been completed.

Don R. Craft

Date: 1/30/92

---------- EXHIBIT B ----------

I, the attorney for the debtor in the foregoing petition, declare that I have informed the debtor that the debtor may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under such chapter.

Jeff A. Moyer
P44671

Date: 1/30/92

[EXHIBIT H]

P.O. Box 3310
Grand Rapids, MI 49501

Western District of Michigan

Case Number: 92-80551 DEN

Jeff A. Moyer
161 Ottawa, NW
Suite 600
Grand Rapids, MI 49503

IN RE:
Don R. Craft, 521-42-0169

DISCHARGE OF DEBTOR

It appearing that a petition commencing a case under title 11, United States code, was filed by or against the person named above on 01/30/92, and that an order for relief was entered under chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained];

IT IS ORDERED that

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under 11 U.S.C. Sec. 523;

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4) and (6) of 11 U.S.C. Sec. 523(a);

(c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

Dated: 06/01/92 BY THE COURT

Hon. David E. Nims, Jr.
United States Bankruptcy Judge

[EXHIBIT I]

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. NG92-80551

IN RE DON R. CRAFT, DEBTOR(S)

NOTICE TO CREDITORS AND OTHER PARTIES IN INTEREST

Notice is given that a hearing will be held before the Hon. David E. Nims, Jr. at the U.S. Bankruptcy Court, Room 740 Federal Building, 110 Michigan, N.W., Grand Rapids, MI, at 10:00 A.M. ON FRIDAY, SEPTEMBER 18, 1992 to consider and act upon the following matter:

DEBTOR'S MOTION TO REOPEN CHAPTER 7 BANKRUPTCY ESTATE

Notice & Motion returned to Jeff A. Moyer, Esq. on August 18, 1992 for service of notice & motion upon all creditors on the court's mailing matrix. (kah)

[Seal Omitted]

August 18, 1992-kah
Date

MARK VAN ALLSBURG
CLERK OF BANKRUPTCY COURT

COPY
By: Sandra L. Boylan, Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. NG 92-80551
Chapter 7
Hon. David E. Nims, Jr.

IN RE DON R. CRAFT, DEBTOR

[Received: Aug. 14, 1992]

MOTION TO RE-OPEN BANKRUPTCY ESTATE

NOW COMES Don R. Craft, by and through his attorneys, Rhoades, McKee, Boer, Goodrich & Titta, and moves this Court to re-open the above-captioned Chapter 7 Bankruptcy under provisions of 11 U.S.C. § 350(b) to accord relief to the Debtor with respect to avoiding a Federal tax lien, determining that the Federal tax debt involved has been discharged and for injunctive relief against the continuing collection actions by the Internal Revenue Service. In support of his motion to re-open the Bankruptcy case, the Debtor states as follows:

1. The Debtor filed a Chapter 7 Bankruptcy Petition with this Court on January 30, 1992.

2. The Internal Revenue Service was listed as both a priority and general unsecured creditor for unpaid 1040 and 941 tax liabilities for the period of 1979 through and including 1991.

3. The Debtor was discharged by Order of this Court dated June 1, 1992.

4. The above-captioned Bankruptcy case was closed on June 11, 1992.

5. The Internal Revenue Service has continued to attempt collection of debts previously discharged by the Debtor's Chapter 7 Bankruptcy Petition.

6. The Debtor requests the above-captioned Bankruptcy case be re-opened under provisions of § 350(b) to accord relief to the Debtor having to do with the extent of his discharge and for other cause.

7. The Debtor further requests the fee to re-open this Bankruptcy be waived by the Bankruptcy Court since this Motion and the accompanying Adversary Complaint are both being filed seeking to enforce the terms of the Debtor's discharge.

NOW WHEREFORE, Don R. Craft, Debtor, prays this Court to re-open this Bankruptcy case to allow the appropriate actions to be filed to determine conclusively whether the listed tax debt was discharged, whether the Federal tax lien filed by the Internal Revenue Service was valid and to seek this Court's enforcement of the injunctive powers contained within provisions of § 524(a)(2) and (3).

Respectfully submitted,

Dated: August 14, 1992

RHOADES, MCKEE, BOER,
GOODRICH & TITTA

By: JEFF A. MOYER
JEFF A. MOYER (P44671)
Attorneys for Don R. Craft
Business address:
600 Waters Building
Grand Rapids, MI 49503
(616) 235-3500

[EXHIBIT J]

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. NG 92-80551
Chapter 7
Hon. David E. Nims, JR.

IN RE DON R. CRAFT, DEBTOR

[Oct. 7, 1992]

ORDER RE-OPENING CASE

At a session of said Court of Bankruptcy held in the Federal Building, in Grand Rapids, Michigan, on September 18, 1992.

PRESENT: HONORABLE DAVID E. NIMS, JR.
United States Bankruptcy Judge

The Debtor having moved this Court to re-open his Chapter 7 Bankruptcy to accord certain relief; the Court having reviewed the pleadings and the Court's file; and the Court being otherwise duly apprised; the Court having ordered this Case re-opened from the bench at a session of open court on September 18, 1992;

IT IS SO ORDERED.

[Illegible]
Hon. David E. Nims, Jr.
United States Bankruptcy Judge

Examined, Countersigned & Entered

Attest: A True Copy

Deputy County Clerk

Deputy County Clerk

Return for service to:
Jeff A. Moyer
RHOADES, MCKEE, BOER,
GOODRICH & TITTA
600 Waters Building
Grand Rapids, MI 49503
(616) 235-3500

[EXHIBIT K]

United States Bankruptcy Court

WESTERN District of MICHIGAN

[ADVERSARY PROCEEDING
NO. 92 8542]

In re Bankruptcy Case No. NG 92-80551

DON R. CRAFT, **Debtor**

DON R. CRAFT and SANDRA L. CRAFT, **Plaintiff**

INTERNAL REVENUE SERVICE, **Defendant**

SUMMONS AND NOTICE OF PRETRIAL CONFERENCE IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.

Address of Clerk
Mark Van Allsburg, Clerk of Court U.S. Bankruptcy Court Post Office Box 3310 Grand Rapids MI 49501

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney
Jeff A. Moyer (P44671) 600 Waters Building Grand Rapids, MI 49503

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

YOU ARE NOTIFIED that a pretrial conference of the proceeding commenced by the filing of the complaint will be held at the following time and place.

Address	~~Room~~
United States Bankruptcy Court 7th Floor, Federal Building 110 Michigan, N.W. GRAND RAPIDS MICHIGAN	11:00 A.M. Date and Time Tuesday/ Dec. 22, 1992

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

MARK VAN ALLSBURG,
Clerk of the Bankruptcy Court

10-14-92 dgs — By: DAVID G. SCALICI
Date — *Deputy Clerk*

David G. Scalici

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. GG 92-80551
Chapter 7
HON. JAMES D. GREGG

IN RE DON R. CRAFT, DEBTOR

DON R. CRAFT AND SANDRA L. CRAFT, PLAINTIFFS

vs.

INTERNAL REVENUE SERVICE, DEFENDANT

[ADVERSARY PROCEEDING NO.
92 8542
ALL DOCUMETS REGARDING THIS
MATTER MUST BE IDENTIFIED BY
BOTH ADVERSARY AND DEBTOR
CASE NUMBERS]

[Received: AUG. 14, 1992 PM 4:27]

COMPLAINT TO DETERMINE DISCHARGEABILITY, VALIDITY OF FEDERAL TAX LIENS, AND ENFORCEMENT OF POST-DISCHARGE INJUNCTION

NOW COMES Don R. Craft ("Debtor") and Sandra L. Craft, by and through their attorneys Rhoades, McKee, Boer, Goodrich & Titta, and for their Complaint state as follows:

1. This Complaint is to determine if certain indebtedness asserted by the Internal Revenue Service ("IRS") against the Debtor has been discharged, to determine the validity of the Federal tax liens filed by the IRS, and to enforce the injunctive provisions of 11 U.S.C. § 524(a)(2) and (3) against the IRS. This Complaint is filed pursuant to Federal Rule of Bankruptcy Procedure 7001(2), (6), (7) and (9).

2. This Court has jurisdiction in this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334 since this proceeding arises in the above-captioned Chapter 7 case which was heard before this Court. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(C), (I), (K) and (O).

3. Don Craft was a Michigan resident formerly residing at 2656 Berwyck Road, S.E., Grand Rapids, Michigan 49506 at the time this Chapter 7 petition was filed and for a period in excess of 180 days prior to filing. Sandra L. Craft is the non-debtor spouse who resides with the Debtor.

4. The Defendant is an instrumentality of the United States government charged with the responsibility of collection and enforcement under various Federal taxation statutes. The Defendant's local representative in the office of District Director is Mr. Paul J. Papsun who performs duties for the IRS as an agent at the Department of Treasury, 477 Michigan Avenue, Detroit, Michigan 48226.

5. Don R. Craft filed a Chapter 7 petition with this Court on January 30, 1992.

6. The IRS was listed on Schedule E of the Debtor's Chapter 7 petition as a priority creditor in the amount of $10,300 for unpaid 1040 liability for years

1988 through 1991 and also an undetermined amount of unpaid "trust fund" liability arising out of unpaid 941 taxes for the years 1979 through 1991.

7. The IRS was further listed on Schedule F as an unsecured creditor in the amount of $509,271.71 for unpaid 1040 tax liability for tax years 1979 through and including 1987 after determining that the provisions of § 507(a)(7), § 503(b)(1)(B) and § 523(a)(1) were not applicable.

8. The petition, schedules and matrix on file with the Court reflect appropriate notice to the IRS and the Debtor's schedules further provide record notice to the IRS of the treatment of their claim by the Debtor's bankruptcy petition.

9. Don R. Craft, Debtor, was discharged by Order of this Court signed on June 1, 1992.

10. The IRS did not at any time file any motion, request for hearing or adversary proceeding before this Court concerning the above-captioned bankruptcy case to assert that the treatment of its claims were incorrect or that the debts should not be discharged.

11. The IRS filed a Notice of Federal Tax Lien (Form 668(Y)) with the Kent County Register of Deeds against the Debtor for a residence listed at 2656 Berwyck, S.E., Grand Rapids, Michigan 49506 on March 30, 1989. See Exhibit A.

12. At the time the Federal tax lien was recorded against the interest of the Debtor in the house located on 2656 Berwyck, this home was owned by the Debtor and his non-debtor spouse as tenancy by the entireties property. See Exhibit B.

13. Under the current and controlling case law within the Sixth Circuit as it determined the application of Michigan law, a Federal tax lien against the husband only does not attach to any home owned by the husband and wife by tenancy by the entireties. *United States v. Certain Real Property Located at 2525 LeRoy Lane, West Bloomfield, Michigan*, 910 F.2d 343, 350 (6th Cir. 1990); *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971). The *Cardoza* Court went on to state that a Federal tax lien against a husband only constituted a cloud upon the title to a Michigan home owned by the husband and wife as tenancy by the entireties property and that the husband and wife were entitled to have the Federal tax lien declared a nullity as to their home. That Court went on to order the county register of deeds to declare the Federal tax lien filed to be null and void as to that property. *Cardoza*, 441 F.2d at 1344.

14. The IRS has been informed on several occasions that this factual situation exists and that their Federal tax lien could not have legally attached. Counsel for the Debtor has further requested that the IRS provide a "*Cardoza*" letter to serve as a release to any title company for the Federal tax lien filed against the subject property. See Exhibits C, D, and E.

15. The IRS has continued and persisted in refusing to acknowledge the invalidity of their lien, release their lien as filed against this home and has continued to seek enforcement of this discharged debt in violation of the provisions of § 524(a)(2) and (3). See Exhibit F.

WHEREFORE, Don R. Craft and Sandra L. Craft request this Court to determine that (a) the entire debt which is the subject of the Federal tax lien filed on March 30, 1989 has been discharged; (b) said Federal

tax lien was a nullity and did not attach to the marital home owned by the Debtor and his non-debtor spouse as tenancy by the entireties' property at the time the lien was filed; (c) that said tax lien should be ordered by this Court to be removed from the title by the register of deeds for Kent County as being null and void; and (d) that the IRS be hereafter permanently enjoined from any and all continuations or commencements of actions or processes to collect, recover or enforce this discharged debt against the Debtor.

Dated: August 13, 1992

RHOADES, MCKEE, BOER,
GOODRICH & TITTA
Attorneys for Don R. Craft
and Sandra L. Craft

By: JEFF MOYER
JEFF A. MOYER (P44671)
Edward B. Goodrich
(P14176)
Peter A. Titta (P21476)
Business address:
600 Waters Building
Grand Rapids, MI 49503
(616) 235-3500

Form 668(Y)
(Rev. December 1989)

Department of the Treasury - Internal Revenue Service

Notice of Federal Tax Lien Under Internal Revenue Laws

District	Serial Number	For Optional Use by Recording Office
DETROIT	69006927 [illegible]	

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer [illegible]N A CRAFT

Residence

[illegible]058 BERWYCK SE
[illegible] RAPIDS MI [illegible]

IMPORTANT RELEASE INFORMATION: With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/79	521-42-0169	07/28/80	[illegible]/27/94	[illegible]108.26
1040	12/31/80	521-42-0169	07/28/80	[illegible]/27/94	[illegible]598.76
1040	12/31/81	521-42-0169	07/28/80	[illegible]/27/94	[illegible]723.35
1040	12/31/82	521-42-0169	11/26/88	[illegible]/25/95	1602.70
1040	12/31/83	521-42-0169	07/28/86	[illegible]/27/94	[illegible]07 9.5[illegible]
1040	12/31/84	521-42-0169	07/28/80	[illegible]/27/94	[illegible]1003.62
1040	12/31/85	521-42-0169	07/28/80	[illegible]/27/94	[illegible]474.93
1040	12/31/87	521-42-0169	07/26/88	06/27/94	890.97
1040	12/31/87	521-42-0169	06/06/88	[illegible]/06/94	2837.33

Place of Filing

[illegible] Total $ 482446.73

KENT CNTY REG OF DEEDS GRAND RAPIDS, MI

This notice was prepared and signed at DETROIT, MICHIGAN, on this,

the 30 day of MARCH, 19 89

EXHIBIT A

Signature E. P. Erickson CD

Title CHIEF, ADVISORY UNIT

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Rev. Rul. 71-466, 1971 - 2 C.B. 409)

Form 668(Y) (Rev. 12-89)

96

COUNTY TREASURER'S
TAX CERTIFICATE OF SALE OR DEED
DATED

Liber 2129 Page 1186

This Indenture, made this 16th day of May in the year one thousand nine hundred and seventy-two

between LEE R. ALBERT and wife, SARA ALBERT
2748 Berwyck Rd., S.E., Grand Rapids, Michigan

parties of the first part

AND DON R. CRAFT and wife, SANDRA LEE CRAFT
of 2856 Berwyck Rd., S.E., East Grand Rapids, Michigan
(Mailing Address)

husband and wife as tenants by the entirety, parties of the second part.

Witnesseth, That the said part ies of the first part, for and in consideration of the sum of:

Forty-eight Thousand and No/100ths (48,000.00) Dollars,

to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents, grant, bargain, sell, remise, release, alien and confirm unto the said parties of the second part, and their heirs and assigns or grantees, FOREVER, all that certain piece or parcel of land situate and being in the City of East Grand Rapids County of Kent, and State of Michigan, and described as follows, to-wit:

Lot 78, Albert-Realtors Hampshire Replat, as recorded in Liber 55 of Plats, Pages 8 and 9, Kent County, Michigan.

Tax Certificate as required by Sec. 135, Act No. 134, Public Acts of 1893 duly presented

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining: To Have and To Hold the said premises, as herein described, with the appurtenances, unto the said parties of the second part, and to their assigns, and the survivor of the parties of the second part, his or her heirs or assigns, FOREVER. And the said LEE R. ALBERT and wife, SARA ALBERT for themselves, their heirs, executors, and administrators, do covenant, grant, bargain and agree to and with the parties of the second part, their assigns, and the survivor of the parties of the second part, his or her heirs or assigns, that at the time of the ensealing and delivery of these presents they are well seized of the above granted premises in Fee Simple, and that they have good right to bargain and sell the same in manner and form aforesaid.

and that they will and their heirs, executors, and administrators shall Warrant and Defend the said premises against all lawful claims whatsoever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in presence of

Lee R. Albert

Hyman H. Rosen

Sara Albert

Donna J. Avery

STATE OF MICHIGAN, } ss.
County of KENT

On this 16th day of May in the year one thousand nine hundred and seventy-two before me, a Notary Public in and for said County personally appeared LEE R. ALBERT and wife, SARA ALBERT to me known to be the same persons described in and who executed the within instrument, who acknowledged the same to be their free act and deed.

Donna J. Avery
Notary Public
Kent County, Michigan
My commission expires August 16, 1974

* NAME OF PERSON WHO DRAFTED THIS INSTRUMENT
Donald F. Osterhouse
ADDRESS
810 Union Bank Building
Grand Rapids, Michigan 49503

When Recorded Return to Drafter

When Recorded Mail Tax Statements to

STATE OF MICHIGAN REAL ESTATE TRANSFER TAX
Dept. MAY 30 '72 $52.80

Kent County Register of Deeds Office

Kent County Register of Deeds Office

EXHIBIT B

97

[EXHIBIT C]

RHOADES, MCKEE, BOER, GOODRICH & TITTA
ATTORNEYS AT LAW

161 OTTAWA AVENUE N.W., SUITE 600
GRAND RAPIDS, MICHIGAN 49503-2793
TELEPHONE (616) 235-3500
FAX (616) 459-5102

OF COUNSEL
JEAN MCKEE
CHARLES T. ZIMMERMAN
ROBERT F. WILLIAMS
ROBERT J. DE BOER

AFFILIATED OFFICES
DE FRANCESCO & DE FRANCESCO
ST. JOSEPH, MI & NEW BUFFALO, MI

[NAMES OMITTED]

May 26, 1992

Mr. Paul Patsun
Special Procedures
IRS Advisory Unit 1
Stop 47
477 Michigan Ave.
Detroit, MI 48226

In Re: Federal Tax Lien: Donald Craft, 2656 Berwyck, East Grand Rapids, Michigan

Dear Mr. Patsun:

We are the attorneys for the Seller of the real estate located at 2656 Berwyck.

A title search related to the sale has disclosed a Notice of Federal Tax Lien dated March 30, 1989 and recorded April 7, 1989, in Liber 2613 at Page 232, was filed against Donald Craft. A copy of the lien is attached. At the time the lien was recorded, the real estate was owned by the taxpayer, Mr. Donald Craft and his spouse, Sandra Lee Craft, as tenants by the entirety. A copy of the deed is attached. Mr. Craft deeded his interest in the property to Sandra Lee Craft on August 28, 1989, by deed recorded in Liber 2660 at Page 7 on August 29, 1989. A copy of the deed is attached.

We have been requested by the title insurance company to obtain a "Cardoza" letter from your office indicating that the lien against Mr. Craft, individually, has no validity as to the property owned as tenants by the entirety. *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971).

Would you please provide such verification as to Mr. Craft.

Very truly yours,

/s/ PETER A. TITTA
PETER A. TITTA

PAT: ab

cc: Mr. Donald Craft
Transamerica Title
Ms. Sue Allen, Fletcher Realty

[EXHIBIT D]

RHOADES, MCKEE, BOER, GOODRICH & TITTA
ATTORNEYS AT LAW

161 OTTAWA AVENUE N.W., SUITE 600
GRAND RAPIDS, MICHIGAN 49503-2793
TELEPHONE (616) 235-3500
FAX (616) 459-5102

OF COUNSEL
JEAN MCKEE
CHARLES T. ZIMMERMAN
ROBERT F. WILLIAMS
ROBERT J. DE BOER

AFFILIATED OFFICES
DE FRANCESCO & DE FRANCESCO
ST. JOSEPH, MI & NEW BUFFALO, MI

[NAMES OMITTED]

Second Request – June 11, 1992

May 26, 1992

Mr. Paul Patsun
Special Procedures
IRS Advisory Unit 1
Stop 47
477 Michigan Ave.
Detroit, MI 48226

In Re: Federal Tax Lien: Donald Craft, 2656 Berwyck, East Grand Rapids, Michigan

Dear Mr. Patsun:

We are the attorneys for the Seller of the real estate located at 2656 Berwyck.

A title search related to the sale has disclosed a Notice of Federal Tax Lien dated March 30, 1989 and recorded April 7, 1989, in Liber 2613 at Page 232, was filed against Donald Craft. A copy of the lien is attached. At the time the lien was recorded, the real estate was owned by the taxpayer, Mr. Donald Craft and his spouse, Sandra Lee Craft, as tenants by the entirety. A copy of the deed is attached. Mr. Craft deeded his interest in the property to Sandra Lee Craft on August 28, 1989, by deed recorded in Liber 2660 at Page 7 on August 29, 1989. A copy of the deed is attached.

We have been requested by the title insurance company to obtain a "Cardoza" letter from your office indicating that the lien against Mr. Craft, individually, has no validity as to the property owned as tenants by the entirety. *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971).

Would you please provide such verification as to Mr. Craft.

Very truly yours,

/s/ PETER A. TITTA
PETER A. TITTA

PAT: ab

cc: Mr. Donald Craft
Transamerica Title
Ms. Sue Allen, Fletcher Realty

[EXHIBIT E]

RHOADES, MCKEE, BOER, GOODRICH & TITTA
ATTORNEYS AT LAW

161 OTTAWA AVENUE N.W., SUITE 600
GRAND RAPIDS, MICHIGAN 49503-2793
TELEPHONE (616) 235-3500
FAX (616) 459-5102

OF COUNSEL
JEAN MCKEE
CHARLES T. ZIMMERMAN
ROBERT F. WILLIAMS
ROBERT J. DE BOER

AFFILIATED OFFICES
DE FRANCESCO & DE FRANCESCO
ST. JOSEPH, MI & NEW BUFFALO, MI

[NAMES OMITTED]

July 15, 1992

Internal Revenue Service
Attn: Paul J. Papsun
477 Michigan Avenue
Detroit, MI 48[illegible]6

RE: Request for a Certificate of Discharge –
Donald Craft
Refer Reply to: PJP
Our File No.: 37084-1

Dear Mr. Papsun:

Enclosed are the following documents which I am submitting to your office with regard to the request for a Certificate of Discharge – Donald Craft:

1. Copy of purchase deed;
2. Copy of Quit Claim Deed from Mr. and Mrs. Craft to Mrs. Craft dated August 28, 1989, and recorded August 29, 1989, at Liber 2660, Page 7;
3. Printouts from NBD showing mortgage payments made and monthly payment;
4. Copy of St. Mary's Hospital Credit Union statements showing payment of the $273.50 monthly mortgage amount;
5. Copy of signature card establishing that Donald Craft did not have control over St. Mary's Account dated 2/23/92;
6. Copy of Sandra Craft 1040 Schedule A showing she paid all mortgage payments and taxes on the property; and,
7. Copy of bankruptcy court decree discharging all debts, which included federal taxes, of Mr. Donald Craft.

These are furnished in response to the issue of whether Mrs. Craft was actually paying the mortgage or acted as a nominee on behalf of Mr. Craft.

Very truly yours,

/s/ PETER A. TITTA
PETER A. TITTA

PAT: ka
cc: Sandra Craft
Enclosures

[EXHIBIT F]

Internal Revenue Service
District Director

Department of Treasury
477 Michigan Avenue
Detroit, Michigan 48226

Person to Contact:
Paul J. Papsun
Telephone Number:
(313) 226-7157
Refer Reply to:
PJP
Date: June 15, 1992

Peter Titta
Attorney At Law
161 Ottawa Avenue N.W. #600
Grand Rapids, Michigan
49503-2793

Re: Request for a Certificate of Discharge-Donald Craft

Dear Mr. Titta:

I have received and reviewed the above request for a Cole v. Cardoza letter for property located at 2656 Berwyck. Per our conversation on June 15, 1992, the IRS would issue a COLE Letter on this property if the IRS receives all payments made to the mortgage from September 1, 1989 to the present. In addition, Mr. Craft would have to quit claim the property back to both him and his wife (as it correctly should be). If you wish to follow this course of action, please resubmit your application with the with a COPY of this LETTER and the following:

1. Copy of purchase deed.
2. Copy of original quit claim deed.
3. Copy of quit claim deed to correct.
4. Letter from bank as to the amount of each monthly payments for this specific piece of property.

5. Copy of the federal tax lien.
6. Certified check in the amount of those payments.
7. Please sign your application under penalties of perjury.

If you wish not to follow this course of action, your alternative would be to file a quiet title action joining the Internal Revenue Service.

At this time your case has been closed. Thank you for your inquiry and we hope that your questions have been answered.

Sincerely,

/s/ ELIZABETH J. PATINO
ELIZABETH J. PATINO
Chief, S.P.B. Advisory Unit

B 104
(Rev. 8/87)

ADVERSARY PROCEEDING COVER SHEET
(Instructions on Reverse)

ADVERSARY PROCEEDING NUMBER (Court Use Only)
92 8542

PLAINTIFFS	DEFENDANTS
DON R. CRAFT and SANDRA L. CRAFT	INTERNAL REVENUE SERVICE
ATTORNEYS (Firm Name, Address, and Telephone No.) Jeff A. Moyer (P44671) 600 Waters Building Grand Rapids, Michigan 49503 (616) 235-3500	**ATTORNEYS** (If Known) Terry Zabel 678 Front Street Grand Rapids, Michigan 49504

RECEIVED
92 AUG 14 PM 4:27
CLERK, U.S. BKPTCY COURT
WESTERN DIST OF MICH

PARTY (Check one box only) ☒ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☐ 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

IRS has continued collection efforts on discharged debt in violation of 11 U.S.C. §524(a). IRS is attempting to enforce invalid tax lien. 11 U.S.C.

NATURE OF SUIT
(Check the one most appropriate box only.)

- ☐ 454 To Recover Money or Property
- ☒ 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property
- ☐ 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in property
- ☐ 424 To object or to revoke a discharge 11 U.S.C. §727
- ☐ 456 To revoke an order of confirmation of a Chap. 11 or Chap. 13 Plan
- ☐ 426 To determine the dischargeability of a debt 11 U.S.C. §523
- ☐ 434 To obtain an injunction or other equitable relief
- ☐ 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan
- ☐ 456 To obtain a declaratory judgment relating to any of foregoing causes of action
- ☐ 459 To determine a claim or cause of action removed to a bankruptcy court
- ☐ 498 Other (specify)

ORIGIN OF PROCEEDINGS (Check one box only.) ☒ 1 Original Proceeding ☐ 2 Removed Proceeding ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another Bankruptcy Court ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ 510 (NEAREST THOUSAND) OTHER RELIEF SOUGHT: Enforcement of Permanent Injunction ☐ JURY DEMAND

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES

NAME OF DEBTOR: Don R. Craft
BANKRUPTCY CASE NO.: NG 92-80551
DISTRICT IN WHICH CASE IS PENDING: Western District of Michigan
DIVISIONAL OFFICE:
NAME OF JUDGE: David E. Nims, Jr.

RELATED ADVERSARY PROCEEDING (IF ANY)

PLAINTIFF:
DEFENDANT:
ADVERSARY PROCEEDING NO.:
DISTRICT:
DIVISIONAL OFFICE:
NAME OF JUDGE:

FILING FEE (Check one box only.) ☒ FEE ATTACHED ☐ FEE NOT REQUIRED ☐ FEE IS DEFERRED

DATE: August 13, 1992
PRINT NAME: Jeff A. Moyer
SIGNATURE OF ATTORNEY (OR PLAINTIFF): [signature]

[EXHIBIT L]

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. NG 92-80551
Adversary Proceeding No. 92-8542
Chapter 7
HON. JAMES D. GREGG

IN RE: DON R. CRAFT, DEBTOR

DON R. CRAFT AND SANDRA L. CRAFT, PLAINTIFFS

vs.

INTERNAL REVENUE SERVICE, DEFENDANT

[Filed Jan. 25, 1993]

CONSENT JUDGMENT AND WITHDRAWAL OF ADVERSARY PROCEEDING

The undersigned parties appearing through counsel in the above-captioned Adversary Proceeding before this Court have consented to the entry of a Judgment by this Court and the withdrawal of this adversary proceeding upon the entry of that Judgment under the following terms:

1. The Debtor, Mr. Don R. Craft, is deemed to be discharged of all further personal liability to the Internal Revenue Service for liabilities arising out of 1040 tax returns for the period 1979 through and

including 1991 with the following exceptions: Priority taxes in the amount of $10,300 representing liabilities for the years 1988 through 1991, and the secured amount of $2,109 representing the value of the personal property to which the IRS [2] tax lien attached are not discharged. All remaining personal liability of Don R. Craft to the Internal Revenue Service based on the 1040 tax liability for those years is discharged under provisions of 11 U.S.C. § 727(b).

2. Upon entry of this Judgment, the Debtor agrees to withdraw this adversary proceeding against the Internal Revenue Service forthwith.

Dated: January 21, 1993 By: TERRY ZABEL
TERRY ZABEL, District
Counsel
Internal Revenue Service

Dated: January 21, 1993 By: JEFF MOYER
JEFF A. MOYER (P44671)
Attorneys for Don and
Sandra Craft

ORDER

At a session of said Court of Bankruptcy held in the Federal Building, in Grand Rapids, Michigan, on JAN 27, 1993.

PRESENT: HONORABLE JAMES D. GREGG
United States Bankruptcy Judge

The above-captioned Bankruptcy having been filed on January 30, 1992; the Debtor having received his discharge by Order of this Court dated June 1, 1992; the Debtor having filed a Motion to Reopen this Bank-

ruptcy seeking relief against the Internal Revenue Service on August 14, 1992; the Debtor having filed an Adversary Complaint to determine the dischargeability, the validity of Federal Tax Liens and to enforce post-discharge injunction on August 14, 1992; the Court having reviewed and accepted the [3] Stipulation of Facts as between these two parties; the Court having reviewed the above Consent Judgment and being otherwise duly advised on the premises:

IT IS SO ORDERED.

Dated: January ___, 1993 /s/ JAMES D. GREGG
U.S. Bankruptcy
Judge

(7)

Supreme Court, U.S.
FILED
DEC 10 2001
CLERK

No. 00-1831

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SANDRA L. CRAFT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

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58 pp

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QUESTION PRESENTED

Whether the federal tax lien, which applies to "property and rights to property . . . belonging to" a delinquent taxpayer (26 U.S.C. § 6321), attaches to the indivisible and inalienable interests of that taxpayer in real property held in a tenancy by the entirety.

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STATEMENT

From 1866 to the present, Congress has authorized the National Government to place a lien on "property . . . belonging to" delinquent taxpayers. Throughout this period of time, the lower courts have held that the lien does not attach to tenancy-by-the-entirety real property when one spouse, but not the other, owes federal taxes and when state law treats the interests in the marital property as indivisible in nature. And in *United States v. Rodgers*, 461 U.S. 677 (1983), four Justices said that the lien statute would not cover an entireties case like this one (Blackmun, J., dissenting, joined by then-Justice Rehnquist, and Justices Stevens and O'Connor), and the five remaining Justices suggested the same but did not finally resolve the question. The Court should make clear today that the statute does not, and never did, reach such property.

Under Michigan law, as under the English common law that preceded it, property owned as a tenancy by the entirety is unique. It is not owned by one person, and it is not owned jointly by two or more persons. It is a fee unlike any other—one owned by, and the product of, a legal marriage. Whatever interest taxpayers thus have in the tenancy flows not from any individual right to the property but from rights that spring from the individual's status as a spouse of another. The property thus does not "belong[] to" one spouse or the other, but to the union between them.

Nor has this time-respected distinction been lost on Congress. In 1866, Congress enacted the law against the backdrop of a common-law tradition that for centuries had respected this view of entireties property and in a setting where the National Legislature itself had embraced (and still embraces) this view of entireties property in regulating the District of Columbia. Yet the legislature did not extend the statute to this unique tenancy, and positively precluded it by including the "belonging to" limitation. In 1916, Congress enacted the estate tax and specified that it applied to tenancies

by the entirety, but nonetheless chose not to extend the lien statute to such property. In 1954, in the immediate aftermath of two federal court of appeals decisions and two district court decisions concluding that the lien statute did not apply to entireties property, the House introduced a bill that would have defined "property" to include this tenancy. But the Senate rejected this "substantive" change in the law. Not surprisingly, in light of this history, every federal court of appeals to address the issue has refused to extend the tax lien statute to entireties property that under state law does not belong to either spouse.

At this late date, it thus is hardly accurate to claim that Michigan is using state-law property doctrines to exempt its citizens from an otherwise-applicable federal law. Quite to the contrary, it is the executive branch of the National Government that is attempting to extend an otherwise-inapplicable law to this taxpayer and in the process to invalidate a venerable Michigan property-law tradition. That change, if it ought to be made at all, should come from the legislature, not the courts.

A. History of the Tenancy by the Entirety.

1. The English Common Law.

Continuity and change, and continuity again, have marked the development of the law of tenancies by the entirety. Beginning in the fifteenth century, if not earlier, *see* 3 William Holdsworth, *History of English Law* 126, 526 (3d ed. 1923), the English common law recognized a unique variation on the joint tenancy. The joint tenancy, as most law students learn and some lawyers remember, represents a form of property ownership in which two or more tenants share the four "unities" of time, title, interest, and possession in a piece of property. What makes a tenancy in the entirety different is the existence of a fifth unity—a "unity of person" arising from a valid marriage. Because the English common law treated the husband and wife as one person, joint ownership was not

possible. Instead, the property was held in its entirety by the marital unit and not by undivided shares.

At common law, the tenancy in the entirety thus differed from the joint tenancy in several respects. First was the nature of the ownership interest. Borrowing from the French, the English common law described the ownership interest of the joint tenancy as seised "per my et per tout" (by the share and by all), and the ownership interest of the tenancy of the entirety as "seised per tout et non per my" (by all and not by the share). 2 William Blackstone, *Commentaries* 182 (R. Burns ed., 1786). While both tenancies involved undivided interests, the tenancy by the entirety constituted an *indivisible* interest and thus neither party had a share in the property. Second, since neither the husband nor the wife had a share in the property, it followed that they (unlike joint tenants) could not by themselves choose to alienate, encumber or partition their interest in the property. In the words of Blackstone's *Commentaries*: "Neither the husband nor the wife can dispose of any part without the assent of the other." *Id. See also* 4 James Kent, *Commentaries on American Law*, at 397-98 (Little, Brown 11th ed. 1866). Third, while both tenancies contained a right of survivorship, that right could be assigned in a joint tenancy but could not be assigned in a tenancy by the entirety. 2 Blackstone, *Commentaries*, at 185-86 (R. Burns ed.). *See also, e.g., Den ex dem. Motley v. Whitemore*, 19 N.C. (2 Dev. & Bat) 537, 1837 WL 495, at *2 (1837) ("This was settled, at least as far back as the reign of Edward the 3rd . . . . "). Lastly, private and governmental creditors traditionally could encumber joint-tenancy property when one tenant was in debt, while they could not do the same with respect to the indivisible interest of tenancy-by-the-entirety property. Roger A. Cunningham, William B. Stoebuck, Dale A. Whitman, *The Law of Property* § 5.5, pp. 215-16 (West 1984); *see United States v. Rodgers*, 461 U.S. 677, 702-03 n.31 (1983).

2. The American Experience.

As a general rule, the American colonies and the first States to the Union embraced these features of the tenancy by the entirety. Oval A. Phipps, *Tenancy by Entireties*, 25 Temp. L.Q. 24, 25 (1951); *Hunt v. Blackburn*, 128 U.S. 464, 469 (1888). "The destruction of joint tenancies," as one commentator noted, "does not apply to conveyances to husband and wife, which . . . are . . . conveyances to one person." 4 Kent, *Commentaries on American Law*, 397.

The American experience with the entireties doctrine, however, was not without innovation. While the tenancy was premised on aspirations that even the most cynical couple could embrace, it contained several untenable anachronisms. Not only was the tenancy a remnant of war-preoccupied feudal times, but it also carried with it some of the most one-sided features of early domestic law. At English common law, married women had few if any individual rights—to Blackstone, "the very being and existence of the woman is suspended," 2 Blackstone, *Commentaries* 430 (Clarendon Press 1765)—and so it could regrettably be said that "[t]he common-law idea of marriage is that the husband and wife become one person, and that person is principally the husband." Irving Browne, *Elements of the Law of Domestic Relations and of the Employer and Employment*, 14 (Boston Book Co. 2d ed. 1890).

It did not take long for nineteenth-century reformers to identify these inequities and for the gravitational forces of democracy to eliminate them. *See* Sarah M. Grimke, *Letters on the Equality of the Sexes and the Condition of Woman Addressed to Mary S. Parker* 74-83 (1838); *Women's Rights Petition to the New York Legislature, 1854* at ¶ 5. The ensuing adoption of the Married Women's Property Acts took root in the middle of the nineteenth century and ultimately confirmed the right of married women to own property in their own name and to retain property owned before the marriage.

Mississippi became the first State to pass the Act in 1839, and eventually all States and the District of Columbia did the same. John V. Orth, *Tenancy By The Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. Rev. 35, 41 (1997).

Passage of the Acts eventually eliminated the universality of the entireties estate. Most western States, as a result of this legislative development, never adopted the doctrine. And as to the States that already had embraced the common-law principle, they took two different paths. Many of these States decided over time that the estate was incompatible with the individual rights of married women to own property, and that husband and wife essentially took such property as joint tenants. These States either eliminated the tenancy completely or effectively did so by defining the spousal interests as divisible, separate and reachable by creditors. *See* Orth, *supra*, at 41. In contrast, fourteen States along with the District of Columbia and the Virgin Islands preserved the tenancy as it existed at common law—but ensured over time that husband and wife shared equal interests in entireties property during their lifetimes and were equally disabled from alienating their interests without the consent of the other. *See* Appendix B (identifying different state laws).

3. The Michigan Experience.

Michigan took the latter path. There, "tenancies by the entireties enjoy an ancient and hoary tradition," *Rogers v. Rogers*, 136 Mich. App. 125, 134 (1984), *appeal denied* (Jan. 22, 1986), and they became part of the State's common law when Michigan entered the Union in 1837, *see Stout v. Keyes*, 2 Doug. 184, 1845 WL 3119, at *3 (Mich. 1845) (the courts "have been adjudicating common law actions upon common law rules and principles, since their organization under the state government").

Nineteenth century Michigan decisions described the tenancy this way:

> The interest William Beamer took with his wife was a peculiar one. It was an entirety. *Fisher v. Provin*, 25 Mich. 347 [(1872)]. They both took the same estate, the same interest, and it could not be separated. The right of the one was the right of the other. Neither could by a separate transfer affect the rights of the other or his own. What would defeat the interest of one would also defeat that of the other.

Vinton v. Beamer, 55 Mich. 559, 561 (1885). *See also Appeal of Lewis*, 85 Mich. 340, 341 (1891). Nor did passage of the Married Women's Property Act in Michigan in 1855 alter this view; it simply made clear that married women like married men could retain or buy property in their own name, but not that they had to do so. *See* 1855 Mich. Pub. Acts 168, § 1; *Fisher*, 25 Mich. at 351 (construing the Act).

Cases from the most recent century adhere to this view. "[I]t has been quite universally held that an estate by the entireties cannot be sold upon execution on a judgment rendered against either the husband or wife, because neither has any separate interest in such an estate." *Sanford v. Bertrau*, 204 Mich. 244, 248-49 (1918). Nor may one spouse encumber such property at the expense of the other:

> It is well settled under the law of this state that one tenant by the entirety has no interest separable from that of the other, has nothing to convey or mortgage or to which he alone can attach a lien. Neither can incumber real estate held as tenants by the entirety without the consent of the other. Each is vested with an entire title and, as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title.

Long v. Earle, 277 Mich. 505, 517 (1936). *See also Nurmi v. Beardsley*, 275 Mich. 328, 330 (1936). The tenancy remained distinct in "form and substance" from the joint tenancy: The "unity" "of person" establishes that "a tenancy by the entirety 'is not a joint tenancy but is a sole tenancy.'" *Budwit v. Herr*,

339 Mich. 265, 272 (1954) (quoting 41 C.J.S., *Husband and Wife*, § 33(b), p. 457); *Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655 (1954) (one spouse lacks "a determinable moiety in entirety property").

In 1975, the Michigan legislature reiterated that the Married Women's Property Act gave husbands and wives equal (albeit still indivisible) interests in entireties property. Mich. Comp. Laws § 557.71(1); 1975 Mich. Pub. Acts 288. After the legislation, it remained true that "[n]either the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other." *Rogers*, 136 Mich. App. at 134-35. *See also Albro v. Allen*, 434 Mich. 271 (1990).

B. History of the Case.

Sandy and Don Craft were married in 1956 and bought a house in Michigan in 1972. Located in Grand Rapids, the house was the Crafts' sole residence and was purchased by them as tenants by the entirety. Pet. App. 2a.

Don became insolvent from April 1980 to August 1989, and failed to file any federal tax return for the tax years 1979 through 1986. Pet. App. 2a-3a. In July 1988, as a result, the IRS assessed him for unpaid taxes in the amount of $482,446.73. *Id.* at 45a. Don failed to pay the assessment, and in March 1989 the IRS filed a federal tax lien against all property and rights to property that belonged to him. *Id.*

In August 1989, Don and Sandy transferred ownership of their house to Sandy through a quitclaim deed. Pet. App. 74a. Three years later, in June 1992, Sandy sold the property to a third party for $119,888.20. *Id.* In accordance with an agreement between Sandy and the IRS, she kept half of the proceeds, and the other half was placed in an escrow account, subject to the same right, title, and interest that the federal tax lien had on the property. *Id.*

In April 1993, Sandy filed a complaint seeking to quiet title to the proceeds in the escrow account. Pet. App. 3a. In response, the IRS argued that Don had fraudulently conveyed the property to Sandy under Michigan law, and alternatively that it was entitled to half of the proceeds from the sale because its lien attached to Don's interest even though the property was owned as a tenancy by the entirety.

In its first decision in the case, the Sixth Circuit ruled for the Crafts. "[B]ecause Michigan law does not recognize one spouse's separate interest in an entireties estate," the court concluded that "a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate." Pet. App. 55a. After determining that Don Craft had no assignable or separate interest in the house, the court remanded the case for a determination of "whether a fraudulent conveyance" had occurred. *Id.* at 57a.

On remand, the district court concluded that the 1989 transfer could not be characterized as fraudulent because Michigan courts have "consistently held that creditors have no right to complain" about a debtor's disposition of "entireties property because such property could not be reached to satisfy debts had it remained in the debtor's hands." Pet. App. 82a. *See Cross v. Commons*, 336 Mich. 665 (1953). At the same time, however, the trial court concluded that Don Craft's decision to make mortgage payments on the property while he was insolvent amounted to a fraudulent enhancement. *Id.* at 86a. The court therefore awarded the IRS the value of these property enhancements, totaling $6,693. *Id.* at 92a.

Both parties appealed to the Sixth Circuit. In addressing the IRS's appeal, the Sixth Circuit rejected the argument that Supreme Court precedent required the panel to revisit its decision in *Craft I*. Case by case, the panel decision (again authored by Judge Cole) refuted this interpretation of the Court's decisions. Pet. App. 18a-19a. In doing so, the court made clear "that state law determines the rights a taxpayer has

in property and federal law determines whether those rights constitute 'property' or 'rights to property' pursuant to section 6321." *Id.* at 15a n.13. And because Michigan law indicates that interests in entireties property are not individually transferable to third parties and cannot be unilaterally encumbered, the court held that they do not amount to attachable property under the federal tax-lien statute. *Id.* at 9a, 19a-20a. That was particularly true in this case, the court added, because the sole apparent interest the IRS attempted to attach—Don Craft's future interest in the home in the event his wife predeceased him—"never ripened into a present estate" as "Don predeceased Sandra" in August 1998. *Id.* at 18a n.15.

In addressing the cross-appeal, the court agreed that Don Craft had engaged in a fraudulent enhancement when he "used his own funds to enhance the property in order to avoid paying his tax debts." Pet. App. 29a. The IRS did not appeal the district court's decision that the 1989 transfer of the property to Sandy Craft was not a fraudulent conveyance.

SUMMARY OF ARGUMENT

The text, statutory context and history of the federal lien statute, together with the case law construing it, all support the decision of the Sixth Circuit.

I.A. In authorizing a federal lien on all "property and rights to property . . . belonging to" delinquent taxpayers, Congress did not allow the IRS to place a lien on the indivisible interest of a spouse in a tenancy by the entirety when one spouse, but not the other, owes federal taxes. Under Michigan law, which "determine[s] what rights the taxpayer has in the property," *Drye v. United States*, 528 U.S. 49, 58 (1999), "one tenant by the entirety has no interest separable from that of the other," and "has nothing to convey or mortgage or to which he alone can attach a lien." *Long*, 277 Mich. at 517. Because it constitutes an indivisible "sole tenancy," *Budwit*, 339 Mich. at

272, the entireties estate is not "property . . . belonging to" one taxpayer or the other.

B. The operative language of the statute dates from 1866, and the common-law background to it cements this conclusion. At that time, the courts consistently recognized that state laws creating liens in favor of private and public creditors did not attach to an indivisible entireties estate when just one spouse owed a personal debt. Section 6321's general reference to "property . . . belonging to" the taxpayer hardly suffices to "abrogate" this rule, *United States v. Texas*, 507 U.S. 529, 534 (1993)—not just because the common-law principle was so well accepted but also because Congress had adopted (and still adheres to) the doctrine in its capacity as the legislative sovereign over the District of Columbia.

C. Other federal statutes reenforce this interpretation. Far from standing alone in the Government's arsenal of tax-collection devices, § 6321 is one of three related statutes in this area. In addition to the lien statute, the Government may invoke (1) the administrative levy statute, which covers "property . . . belonging to" the taxpayer, and which does not require judicial involvement in order to seize relevant property, 26 U.S.C. § 6331, or (2) the foreclosure statute, which does require judicial involvement and notice to all related parties in order to obtain relevant property, 26 U.S.C. § 7403. Under the foreclosure statute, notably, the United States may go to court not only "to enforce the lien" under § 6321, but more expansively to "subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest" to payment of the tax. 26 U.S.C. § 7403(a). The markedly broader language of the foreclosure statute proves that the federal lien does not, as the Government argues (Br. 15), attach to any ineffable thing of "value," but only to historically-recognized property interests that could be attached by lien and that "belong[] to" the taxpayer. Add to this Congress's and the IRS's decision in other tax statutes and regulations to mention tenancies in the entirety by name when

they wish to regulate the unique interests created by them, and it becomes clear that the lien statute does not apply here.

D. Removing any doubt on this score is Congress's decision in 1954 to reject an amendment designed precisely to extend the lien statute to tenancies by the entirety. For the first 75 years or so after the legislature enacted the lien statute, the reported cases offer no indication that the IRS construed the law as applying to taxpayers like the Crafts. That policy apparently changed in the middle of the last century, because in 1951 and 1952 two federal courts of appeal rejected the IRS's effort to extend the lien statute to entireties property. Immediately after these decisions, the House proposed an amendment to the statute specifying that "property or rights to property" "includ[ed] the interest of such person as tenant by the entirety." Not only did the Senate defeat the amendment but the Congress ultimately re-enacted the lien statute without making any relevant changes to it. The timing of the proposal, the surrounding debates, and the decision to re-enact the law unaltered all provide evidence that Congress wished to preserve the lower courts' interpretation of the law.

II. The Court's cases interpreting the lien statute bolster this interpretation. They establish that state-law interests must have pecuniary value, must be independently controlled by the taxpayer, must be exchangeable and must be vested in order to be deemed "property or rights to property . . . belonging to" the taxpayer under federal law. Yet no such showing has been made here. And in applying these principles to joint-ownership interests, the Court has been careful to extend § 6321 and the other tax-collection statutes to joint tenancies only when the delinquent taxpayer, unlike here, has an independent right to alienate or encumber an interest in the property. Indeed, in one of those joint-ownership cases, *United States v. Rodgers*, 461 U.S. 677 (1983), four Justices said that the lien statute would not cover an entireties case like this one, (Blackmun, J., dissenting, joined by then-Justice Rehnquist, and Justices Stevens and O'Connor), and the five

other Justices suggested the same, though they did not finally resolve the question. Lastly, the sudden extension of this provision to entireties property would prompt a host of complex interpretive questions, which the legislature is much better equipped to address than the courts.

III. The Government's contrary arguments do not alter this conclusion. Its textual arguments do not account for—indeed, they omit any discussion of—the "belonging to" limitation in the text of the law, the common-law background to the statute, or the illuminating distinction between the lien and foreclosure statutes. Its discussion of the cases fails to appreciate the Court's careful distinction between joint-ownership settings in which the taxpayer has a separate interest in the property, and indivisible tenancies by the entirety in which no such interest exists. And its suggestions (Br. 25) that the tenancy by the entirety is a relic of a bygone era, that it turns on a mere "legal fiction," that it has lost its political charisma and that it leads to "irrationally disparate treatment of similarly situated taxpayers" cannot be reconciled with the Federal Government's recognition of the tenancy in the District of Columbia both before passage of this statute and ever since. Nor will Sandy Craft's interpretation lead to rampant tax-collection avoidance. The experience with this interpretation over the last 135 years offers no such lesson for the future. Congress's decision to create an unlimited marital deduction from the gift tax proves that property-shifting among spouses is hardly a vital concern—whether in the entireties setting or in the more pedestrian setting of simply putting title to property in the name of one spouse but not the other. And the ready availability of fraudulent-conveyance statutes demonstrates that the Government is more than amply equipped to meet any real risk in this area.

ARGUMENT

In challenging the Sixth Circuit's decision, the United States does not contest the court of appeals' interpretation of

Michigan law. It thus does not disagree with the lower court's description of the parameters of an entireties estate, the nature of the legal interests that arise under it, or the unity of person that characterizes such a tenancy—notably, that it "'is not a joint tenancy but is a sole tenancy.'" *Budwit*, 339 Mich. at 272 (quoting 41 C.J.S., *Husband and Wife*, § 33(b), p. 457). Sandy Craft, for her part, does not challenge the power of the National Government to enact a tax-lien statute that applies to entireties property. Nor does she question whether such a statute would preempt contrary state law.

All that the parties dispute is whether Congress meant to extend this ancient tax-collection tool to this ancient common-law setting and whether it enacted the necessary words to do so. As to that issue, the answer is straightforward: Whether one looks at the question from the vantage point of 1866 or at any time since, every indicator of statutory meaning confirms that Congress never wished to, and never did, break apart the marital unity of person that the common-law tenancy by the entirety brought together.

I. THE TEXT AND HISTORY OF SECTION 6321, TOGETHER WITH THE COMMON-LAW BACK-DROP THAT INFORMS IT, CONFIRM THAT THE LIEN STATUTE DOES NOT REACH ENTIRETIES PROPERTY.

A. By Its Terms, The Tax Lien Statute Does Not Extend To Entireties Property.

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321.

Enacted in 1866, the tax lien statute has remained materially the same ever since. Nineteenth century dictionary definitions confirm that "property" does not have the all-encompassing definition that the Government gives it and frequently was defined to cover only interests that were exclusively and personally one's own. *See* Alexander Burrill, *A Law Dictionary and Glossary* (2d ed. 1871) ("When things are fully our own, or when all others are excluded from meddling with them, or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases"); Giles Jacob, *The Law-Dictionary* (1st American ed. 1811) ("That which is proper or peculiar to one; that which belongs to one; that which is one's own; that to which one has an unrestricted and exclusive right, including all that is one's own, whether corporeal or incorporeal."), *id.* ("property is the highest right" one can have "to any thing . . ., which in no way depends on another man's courtesy").

Likewise, the definition of "lien" at that time concerned the *separate* property interest of the owner that could be attached, and as a result the creditor could take no more rights in the property than the debtor individually had. The lien thus was "commensurate only with the interest of the person through whom it arises," and consequently the government took the lien subject to all limitations on the taxpayer's rights in the property. Archibald Brown, *A Law Dictionary* (1875). *See also Fosdick v. Schall*, 99 U.S. 235, 251 (1878) ("it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor"); 51 Am. Jur. 2d *Liens* § 16; Boris I. Bittker, *Fundamentals of Federal Income Taxation* ¶ 39.7, p. 39-41 (Warren, Gorham & Lamont 1983) ("the government's rights can rise no higher than those of the taxpayer to whom the property belongs").

These definitions of "property" and "lien" do not naturally apply to a tenancy by the entirety when just one spouse owes a debt. In the first place, the essence of the tenancy is that it is indivisible and status-based. Neither individual personally owns the property, neither individual may encumber it, and accordingly there is no separate and personal interest to which the lien may attach. In the second place, since both spouses have equal indivisible interests in all of the property and since the government's "rights can rise no higher than those of the taxpayer," nothing productively could be attached. Everything covered by one spousal interest in the tenancy would be defeated by the other spousal interest.

The "belonging to" language in the statute reenforces these limitations, and indeed this phrase cuts to the heart of what is lienable and what is not. For all that belongs to each spouse is a present right to share use of the property with the other (so long as the marriage lasts) and a future right to receive the property in the event one spouse outlives the other (so long as the marriage lasts). The present right is not exchangeable—one does not buy a present right to enjoy the

landed interests of a spouse—and therefore is not attachable. And the future right, like the possibility of receiving the corpus of a trust if one lives sufficiently long, is too ephemeral and contingent to be attachable. The law has not generally permitted private or public creditors to place a lien on the hope (or fear) of outliving another. Until the future right vests in one individual or the other, such elusive prospects remain no more susceptible to a lien than they do to a levy or foreclosure. On top of that, even the most all-powerful and acquisitive creditor has never been permitted to step into the shoes of one spouse in the marital unit, whether to enjoy the present right to share the property or the future right to retain it upon the death of the other. In the context of a residence owned by the entireties, there is in short no cognizable or determinable property right to attach, and accordingly the words of the statute do not support this attempted exercise of federal power.

B. The General Terms Of The Lien Statute Did Not Alter, And Were Not Designed To Alter, The Common-Law Rule Against Placing Liens On Entireties Property.

When Congress enacted this law, it was well accepted that creditors could not place liens on real property owned by the entireties to satisfy the debt of one member of the marital unit. Because the Court does not lightly interpret legislation to alter such common-law principles, this history also defeats the Government's position.

"[W]here a common-law principle is well established . . . the courts may take it as [a] given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal quotation omitted). *See Cleveland v. United States*, 531 U.S. 12, 17 (2000). In applying this interpretive guide to 42 U.S.C. § 1983, which like the lien statute has a nineteenth-century pedigree, the Court has said that it is fair to assume

that the "members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

What is true of the 42d Congress that enacted § 1983 is true of the 39th Congress that enacted the tax-lien statute. In 1864 and 1865, as part of the revenue packages that included the Nation's first income tax, Congress enacted two short-lived predecessors to the current tax lien statute. The 1864 version, *see* 13 Stat. 223, 233, 38th Cong., 1st Sess., was not a lien statute at all; it provided for distraint of a delinquent taxpayer's income-generating property, nothing more. In 1865, *see* 13 Stat. 469, 470, 38th Cong., 2d Sess., Congress created a lien on "property or rights to property," and just a few months later the 39th Congress amended the statute to appear as follows:

> And if any person, bank, association, company, or corporation, liable to pay tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company or corporation.

14 Stat. 98, 107, 39th Cong., 1st Sess. *See United States v. Estate of Romani*, 523 U.S. 517, 523 nn.5, 6 (1998); *Detroit Bank v. United States*, 317 U.S. 329, 334 (1943). In the intervening 135 years, Congress did not materially change the law. *See* Appendix A.

The common-law and statutory background to this legislation is instructive. Most if not all contemporaneous applications of private and public liens placed those liens on "property" or "real estate." *See, e.g., Ingraham v. Speed*, 30

Miss. 410, 1855 WL 3980, at *2 (Miss. Err. & App. 1855) (statute allowed "banks to take mortgages and other liens on property"); *Cook & Sargent v. Dillon*, 9 Iowa 407, 1859 WL 476 (1859) ("Our statute has made judgments in the Supreme or District Courts liens upon all interests in real estate, legal or equitable"); *Smith v. Ingles*, 2 Or. 43, 45 (1862) ("The statute . . . on this subject provides, in substance, 'that a judgment shall be a lien on real property of the judgment debtor . . . owned by him'"). *See also Mechanics Bank of Alexandria v. Seton*, 26 U.S. 299, 309 (1828) (where holder of stock was trustee and "never . . . the real owner," "no lien for [his] debt ever attached upon it"); *Grove v. Brein*, 49 U.S. (8 How.) 429 (1850) (lien cannot attach to seller's goods while in transit to buyer because title had already passed).

Yet, in the years before and shortly after 1866, the courts to our knowledge universally held that these statutory and common-law liens did not attach to traditional entireties property when just one spouse owed a personal debt. *See, e.g., Thomas v. DeBaum*, 14 N.J. Eq. 37, 1861 WL 3581, at *3 (N.J. Ch. 1861) ("The judgment, therefore, against the husband alone could not encumber or affect the joint estate of the husband and wife"); *Humberd v. Collings*, 20 Ind. App. 93 (1898) ("neither is the [entireties] estate liable for the debts of one of the tenants"); *Shinn v. Shinn*, 42 Kan. 1, 9 (1889) (lien invalid because where "the property is held in entirety by both the husband and wife there is no separate estate or interest in either which could be levied upon"); *Hemingway v. Scales*, 42 Miss. 1, 1868 WL 2219, at *11 (Err. & App. 1868) (disallowing sale of husband's estate to pay creditors because he could "not dispose of any part of the inheritance without his wife's concurrence"). Nor did it matter whether the creditor seeking the entireties property was a private or public one. *Town of Corinth v. Emery*, 63 Vt. 505 (1891) ("[t]he estate of the wife, and her husband's interest therein in her right, in the property in question, is protected from the husband's sole creditors"); *Morrison v. Seybold*, 92 Ind. 298, 1883 WL 5763,

at *4 (1883) ("the [entireties] land in controversy did not become liable for the payment of the taxes assessed upon the personal property of John S. Hart"); *Wallace v. Mestichelli*, 58 Pa. D. & C. 647, 648 (Pa. Comm. Pl. 1946) ("Admittedly, under the law of Pennsylvania a judgment against a husband does not become a lien upon property held by such husband and wife as tenants by the entireties. There is apparently nothing in any Federal law which would give the Federal Government greater rights than any ordinary judgment creditor to recover . . . taxes due."). *See also Humbert*, 20 Ind. App. 93 (assessment for gravel roads).

Under these historical circumstances, it strains credulity to assume that a body of lawmakers still captivated by Blackstone's *Commentaries* would preempt this common-law tradition through a general lien statute applicable to "property or rights to property." And still less is it possible to believe that they would do so at the same time that they added the "belonging to" limitation, which by its terms preserves rather than upsets this bedrock principle of the common law.

This principle of construction has special application here because not just the States, but the District of Columbia as well, embraced this doctrine. Recognizing that Congress has legislative control over the statutory and common law of the District, U.S. Const. art. 1 § 8, cl. 17; *Berman v. Parker*, 348 U.S. 26, 31 (1954), the Court has observed that "the policy of Congress" in regulating our country may be "shown by" the policy it embraces in regulating our national city, *Donnelley v. United States*, 276 U.S. 505, 517 (1928) ("And the policy of Congress [in a provision of the federal Prohibition Act] is further shown by the Prohibition Act for the District of Columbia"). *See also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 512-19 (1989) (looking at pertinent D.C. Code in construing the Federal Rules of Evidence).

The "policy" of Congress in the District of Columbia has remained steadfast from the nineteenth century to the present.

Entireties property, the National Legislature has made clear, does not belong to either spouse and as a result cannot be attached to pay the debts of one spouse. *See Am. Wholesale Corp. v. Aronstein*, 10 F.2d 991, 992 (D.C. Cir. 1926) ("A judgment against the husband is not a lien on the [entireties] land, nor can his interest be sold under an execution."); *Alpher v. Preston (In re Estate of Wall)*, 440 F.2d 215, 218 (D.C. Cir. 1971) ("So it is with us today that the full complement of common law characteristics of cotenancy by the entireties is preserved[, including] a broad immunity from claims of separate creditors"). *See also Settle v. Settle*, 8 F.2d 911, 912 (D.C. Cir. 1925) ("[i]t cannot be disputed that this doctrine was imported into the early common law of the District"). While it is improbable that Congress would casually abrogate any well-accepted common-law principle, it is particularly improbable that it would do so when Congress had already adopted that principle for the District of Columbia.

C. Other Tax Statutes Indicate That Congress Did Not Extend The Lien Statute To Traditional Entireties Estates.

Because a statute is "known by the company it keeps," *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (quotation omitted), the Court has frequently looked to related legislation to ascertain congressional meaning. In this instance, the foreclosure, estate and gift tax statutes all support this reading of the lien statute.

In addition to the lien statute, the Government has two other significant tax-collection devices—the administrative levy statute and the judicial foreclosure statute. The levy statute permits the Government to seize "property or rights to property . . . belonging to" the taxpayer by executive act and thus without judicial intervention. 26 U.S.C. § 6331. The foreclosure statute provides a mechanism for collecting taxes that is both narrower and broader than the levy statute. It is narrower because the statute requires the filing of a civil

action and notice to all parties with an interest in the property. But it is broader because it allows the Government either "to enforce the lien" under § 6321 or "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." 26 U.S.C. § 7403(a). The markedly-broader coverage of property interests susceptible to foreclosure demonstrates that the lien statute was not designed to cover all conceivable interests in property. Otherwise, the drafters of § 7403(a) would not have believed it necessary to specify a second foreclosure option and would not have believed it necessary to establish that this second option went beyond "property . . . belonging to" the taxpayer to "any right, title, or interest" of the taxpayer. While it seems unlikely that the foreclosure statute itself reaches entireties property in view of the unique definition of that property interest, there can be little doubt that it covers more property interests than the lien statute. This, too, defeats the Government's all-encompassing interpretation of § 6321.

Congress's treatment of the estate and gift taxes leads to a similar conclusion. In 1916, three years after ratification of the Sixteenth Amendment, Congress enacted an estate tax. In doing so, the legislature specified not only that the tax would apply to entireties property but also explained how that application would work. Under § 202 of the Act, "the value of the gross estate of the decedent" was to "be determined by including the value at the time of his [or her] death of all property, real or personal, tangible or intangible, wherever situated." 39 Stat. at 777, 64th Cong., 1st Sess. Then § 202(c) specified that the value of the estate would include "the extent of the interest therein held jointly or as tenants by the entirety." *Id.* at 778. As the Court commented in *Tyler v. United States*, 281 U.S. 497, 501 (1930), in assessing the constitutionality of the provision, "[t]he applicable provision of § 202(c) is explicit, and the intent of Congress thereby to impose the challenged tax is not open to doubt." Without this

language, *Tyler* indicated, the "inclusion of [entireties] property" "probably could not be justified by the terms of the statute." *Id.* at 501-502.

The gift tax follows this pattern. As enacted in 1932, the gift tax applied to "the transfer . . . of property by gift . . . whether the property is real or personal, tangible or intangible." 47 Stat. 245, 72nd Cong., 1st Sess., § 501 (1932). Immediately thereafter (and in notable contrast to the lien statute), the IRS promulgated a regulation specifying that the tax applied to the creation or termination of entireties property where one spouse provided most or all of the consideration. Treas. Reg. § 79 (1933); *see* 47 Stat. 245, *supra*, § 530. Then, in 1954, Congress changed the rule, making clear that the tax did not apply to the creation of entireties property as between spouses, *see* 26 U.S.C. § 2515 (1954) (real property) and § 2515A (1976) (personal property)—a position that the legislature maintained until it enacted the unlimited marital deduction for gifts. Pub. L. 97-34, 95 Stat. 172, § 403(c)(3)(B), 97th Cong., 1st Sess. (1981). The Federal Government's explicit regulation of entireties property in the estate and gift tax settings provides further evidence that the conspicuously-silent lien statute does not cover this tenancy.

D. In 1954, Congress Rejected An Amendment Designed To Extend The Lien Statute To Entireties Property.

The history of § 6321 completes this interpretive picture. For three quarters of a century after passage of the lien law, it appears that the Government did not try to attach entireties property. No federal cases are reported revealing any such effort, and it would seem that the Government had the same expectations about the scope of the general lien law that private and state creditors had about comparable state lien laws—that they did not attach to traditional entireties property when just one spouse owed taxes.

That policy appeared to change when the Government pursued two lien claims in Michigan. In 1939, in *Shaw v. United States*, 94 F. Supp. 245 (W.D. Mich.), the Government argued that the lien attached to a husband's interest in entireties property. But the district court disagreed, noting that "the Supreme Court of Michigan has consistently aligned itself with what appears to be the majority rule to the effect that no portion of an estate by the entireties may be subjected to a lien for the individual indebtedness of either spouse." *Id.* at 246. "This immunity," the court added, "is not an exemption but arises from the peculiar nature of the estate" under Michigan law. *Id.* Six years later, in *United States v. Nathanson*, 60 F. Supp. 193 (E.D. Mich. 1945), the Government made the same claim and met the same fate. Observing that the Government could not show any cases "for its position that creditors [of one spouse] can successfully levy on the rents from an estate by the entirety," *id.* at 194, the court concluded that a lien could not "be imposed upon property held by the entirety for taxes due from the husband alone." *Id.*

This pattern soon repeated itself at the courts of appeal. In 1951, in *United States v. Hutcherson*, 188 F.2d 326 (8th Cir.), the court held that the federal tax lien statute did not extend to tenancies property, concluding that "[t]he characteristic of immunity from the individual debt of either spouse must, under the Missouri law, exist or the estate is not one by the entirety." *Id.* at 330. One year after that, the Third Circuit reached a similar result in *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952).

Hutcherson, Raffaele and the Michigan district court cases did not go unnoticed. In 1953, as Congress was preparing its comprehensive overhaul of the Internal Revenue Code, the legislature received a suggestion: "[T]he law should be changed," the Joint Committee on Taxation was told, "to overcome the effect of court decisions holding that the Commissioner cannot levy on the whole or any part of

property held by husband and wife as tenants by the entirety to satisfy the tax debts of one of the spouses." Staff of J. Comm. on Internal Revenue Taxation, 83d Cong., 2d Sess. Preliminary Digest of Suggestions for Internal Revenue Revision Submitted to the J. Comm. on Internal Revenue Taxation (J. Comm. Print 1953). The House agreed and proposed adding the following phrase to the tax lien statute immediately after the words "property and rights to property"—"(including the interest of such person as tenant by the entirety)." *See* H.R. Rep. No. 83-2543 (1954). In the view of the House, this represented "[a]n important change" to existing law and it was designed only to "impose a lien upon the right of survivorship of the tenant by the entirety." *See* Staff of J. Comm. on Internal Revenue Taxation, 83d Cong., Material Proposed to be Included in Ways and Means Comm. Print, binder 54, at 2. *See also* H.R. 8300 Rep. No. 1337 (1954).

The amendment did not fare well in the Senate. The President of the Florida Title Association wrote to explain that the proposal "does not provide to what extent the claim of lien would exist nor how it is to be enforced and how it may be released," and that "it would vitally affect the method of title evidencing" in entireties States. *See* Hearings Before the Comm. on Finance of the United States Senate, H.R. 8300, 83rd Congress, Part 4 (1954). The Senate Finance Committee took up the matter and eventually rejected this change in the law. It indicated, through a press release no less, that the House's definitional modification would have made a "substantive change" in the law and would *not* simply "continue" the "present law" in "effect." Senate Finance Comm., 83d Cong., Press Release No. 4 on H.R. 8300 (Comm. Print 1954). At the end of the day, Congress thus opted to "continue the existing law" under the tax-lien statute, Report of the Senate Comm. on Finance, H.R. 8300, 83d Cong. (1954), as that law was reflected in the recently-decided lower-court decisions. *See also* Summary of Finance

Committee Amendments to H.R. 8300 ("restor[ing] present law by deleting" House amendment).

It takes little historical imagination to draw the common-sense conclusion that the 1954 House amendment was designed specifically to change the lien statute as it had been interpreted by the lower courts prior to the proposal. And the Senate's rejection of that effort confirms that this interpretation of the law was meant to remain unchanged—particularly since the Congress as a whole in 1954 ultimately re-enacted the very language of the statute that the lower courts had held did not cover traditional entireties property. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983). That same inference applies here—particularly in light of the pre-amendment history of lower court decisions and the 1954 re-enactment of the original language of the law. *Compare Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982) (when Congress "left intact the statutory provisions under which the federal courts had implied a cause of action," inaction was itself evidence that Congress affirmatively intended to preserve that remedy), *and Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993) (when Congress re-enacts statutory language that has been given a consistent judicial construction, the Court adheres to that interpretation in construing the reenacted law), *with Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (refusing to rely on congressional inaction that was susceptible to multiple interpretations).

Any doubt about this point is laid to rest by the post-1954 history of the statute. After the failed effort to amend the provision in 1954, the lower courts continued to respect state laws treating entireties property as indivisible in nature and as belonging to the marital unit rather than to either individual.

See, e.g., United States v. Am. Nat'l Bank of Jacksonville, 255 F.2d 504 (5th Cir.), *cert. denied*, 358 U.S. 835 (1958); *Benson v. United States*, 442 F.2d 1221 (D.C. Cir. 1971); *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971); *Internal Revenue Serv. v. Gaster*, 42 F.3d 787 (3d Cir. 1994); *United States v. Davenport*, 106 F.3d 1333 (7th Cir. 1997) (*dictum*). *See also Pitts v. United States*, 946 F.2d 1569 (4th Cir. 1991). And while Congress debated the appropriate treatment of entireties property, it did not extend the lien statute to such interests. *See, e.g.*, J. Comm. on Taxation, 107th Cong., 1st Sess. (2001). Nor did Congress do so when it enacted The Federal Tax Lien Act of 1966, Pub.L. 89-719, 80 Stat. 1125, which made significant changes to other components of the federal lien laws.

II. THE COURT'S CASES CONFIRM THIS INTERPRETATION.

A. State-Law Property Interests Must Be Exchangeable, Divisible And Vested To Be Covered By The Federal Lien Statute.

The tax lien statute, the Court repeatedly has made clear, does not itself "'create[]'" "'property rights but merely attaches consequences, federally defined, to rights created under state law.'" *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985) (quoting *United States v. Bess*, 357 U.S. 51, 55 (1958)). As the Court summarized the point most recently: "We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify." *Drye*, 528 U.S. at 58.

In ascertaining what "state-delineated rights" fall "within the compass" of the federal statute, *Drye*, 528 U.S. at 58, the Court has been careful to say that the law does not cover just any ephemeral interest of "value." Not only must the right be of some value under state law, but it also must contain other,

more concrete qualities. The value must be quantifiable or "pecuniary" in nature. *Id.* at 60 n.7. The taxpayer's interest must have "ripen[ed] into a present estate." *Id.* The taxpayer must have the "unqualified right" to "exercise[] dominion over the property." *Id.* at 60-61. And the taxpayer must have the right "to channel that value to" another, *id.* at 61—which is to say the interest must have "'an exchangeable value,'" *id.* at 56 (quoting *Jewett v. Commissioner*, 455 U.S. 305, 309 (1982)), and must be a non-personal interest that others (besides the taxpayer) may equivalently enjoy, *see Rodgers*, 461 U.S. at 691 n.16 (quoting Bittker, *Federal Taxation of Income, Estates, and Gifts* ¶ 111.5.4, at 111-102) (1981) ("'the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out'"). *See Rodgers*, 461 U.S. at 690-91 (the "Government's lien under § 6321 cannot extend beyond the property interests held by the delinquent taxpayer").

In applying these principles, the Court's actions have matched its words. In *Bess*, for example, the Court held that a taxpayer's present right under a life insurance policy to obtain the cash surrender value of the policy was "property . . . belonging to" the taxpayer. *United States v. Bess*, 357 U.S. 51, 55-56 (1958). But, at the same time, it held that the lien could not attach to the future proceeds of a life insurance policy. "It would be anomalous," the Court held, "to view as 'property' subject to lien proceeds never within the insured's reach to enjoy." *Id.* at 55-56. And in *Drye*, the Court applied the statute to a vested inheritance that the heir had a right under state law to disclaim within nine months of the decedent's death. In doing so, the Court noted that "Arkansas law primarily gave Drye a right of considerable value—the right either to inherit or to channel the inheritance" to an independent party, which "simply cannot be written off as a mere 'personal right.'" 528 U.S. at 60.

The Court has adhered to these principles in the context of joint tenancies and other types of joint ownership interests. In

United States v. National Bank of Commerce, the Court determined that the administrative levy statute applies to all money in a joint bank account, in which the debtor "had the absolute right under state law and under his contract with the bank to compel the payment of the outstanding balances in the two accounts." 472 U.S. at 724. Not only did state law specifically give the taxpayer an independent and separate right to withdraw all of the money in the account, but the IRS (unlike here) had promulgated a regulation that specifically allowed such a levy. *Id.* at 721. And in *United States v. Rodgers*, 461 U.S. 677 (1983), the Court ruled similarly in the context of the foreclosure statute. In extending the statute to a homestead estate, "[i]t bears emphasis," the Court pointed out, "that the rights accorded by the homestead laws vest independently in each spouse" and that each spouse has a "separate" right in the property. 461 U.S. at 685.

B. An Interest In A Tenancy By The Entirety Does Not Satisfy This Test.

Measured against these requirements, the Government's claim clearly fails. Under Michigan law, "one tenant by the entirety has no interest separable from that of the other," and "has nothing to convey or mortgage or to which he alone can attach a lien." *Long*, 277 Mich. at 517. "Husband and wife take the estate as one person," "they take but one estate," *Nurmi*, 275 Mich. at 330, and "neither has any separate interest in such an estate," *Sanford*, 204 Mich. at 248-49.

Each of these features of the tenancy predated enactment of the federal tax lien statute, each has withstood the vicissitudes of time, and each precludes the Government from imposing a lien on the Crafts' house. By any definition of the estate under Michigan law, the house simply was not "property or rights to property . . . belonging" to Don Craft. He could not independently exchange his interest in the property. And any future right to exercise complete control or dominion of the property had not yet vested and clearly was

not exchangeable. *Drye*, 528 U.S. at 60 n.7. Nor was his spousal interest in using the property one that others—whether private or public creditors—could enjoy. A status-related property interest is by definition neither exchangeable nor attachable. After all, it is one thing to step into the shoes of a debtor; it is quite another to assume the role of a spouse in doing so.

C. *Rodgers* Goes A Long Way To Resolving This Dispute.

In *Rodgers*, four Justices reached this same conclusion, and the remaining five Justices left the question open but adopted an analysis that goes a long way to rejecting the Government's argument. The decision therefore deserves extended treatment.

At stake in *Rodgers* was the judicial-foreclosure statute, 26 U.S.C. § 7403, which as noted authorizes the federal government to go to court to force a judicial sale (1) of property on which a federal lien has been placed or (2) of any other property in which the delinquent taxpayer may have an interest. The question for the Court was whether the foreclosure statute authorized the Government to compel a judicial sale of homestead property owned by a husband and wife when just one spouse owed taxes. In concluding that it could, the majority first distinguished § 7403 on the one hand from § 6331 (the levy statute) and § 6321 (the lien statute) on the other. It acknowledged that "the Government's lien . . . cannot extend beyond" the property rights "held by the delinquent taxpayer." 461 U.S. at 690-91. But it then reasoned that "[s]ection 7403(a) provides, not only that the Government may 'enforce its lien,' but also that it may seek to 'subject *any property*, of whatever nature, of the delinquent, or *in which he has any right, title, or interest*, to the payment of such tax or liability.'" *Id.* at 692 (quoting 26 U.S.C. § 7403(a)). The power to go beyond enforcing its lien together with the requirement that all interested persons be

made parties to the judicial proceeding, the Court concluded, showed that Congress contemplated "not merely the sale of the delinquent taxpayer's own interest, but the sale of the entire property." *Id.* at 694. In reaching this conclusion, the majority relied on "the historical background against which the predecessor statute to § 7403 was enacted." *Id.* at 694.

In the course of its analysis, the majority also responded to the dissent's reliance on the 1954 House proposal designed to specify that the tax lien statute covered tenancy-by-the-entirety property. It first noted that the "amendments at issue" bore "only the most tangential relationship" to the case because they "did not concern § 7403." *Id.* at 702 n.31. It then added that "tenancies by the entirety pose a problem quite distinct from that at issue in the case of homestead rights": With entireties property, "no tax lien could attach in the first place because neither spouse possessed an independent interest in the property"; "[i]n the homestead context, by contrast, there is no doubt, even under state law, that not only do *both* spouses (rather than neither) have an independent interest in the homestead property, but that a federal tax lien can at least *attach* to each of those interests." *Id.*

The *Rodgers* majority thus wholeheartedly embraced two reasons for adopting Sandy Craft's position—namely, that the language of the foreclosure statute is conspicuously broader than the language of the lien and levy statutes, and that the meaning of the tax-collection laws are informed by the common-law background surrounding their passage. And the majority halfheartedly embraced a third, more dispositive reason for adopting Mrs. Craft's position—namely, that even if the lien statute covers general homestead rights it does not cover tenancies by the entirety.

The four members of the *Rodgers* dissent (Blackmun, J., writing for then-Justice Rehnquist and Justices Stevens and O'Connor) embraced Sandy Craft's position far more directly. As to the interpretation of the foreclosure law, the dissent

agreed that Congress gave the National Government "greater power" under the foreclosure law than it did under the "more restrictive language" of the lien/levy statutes, *id.* at 726, but believed that "the debtor's default does not vest in the lienholder rights that were not available to the debtor himself." *Id.* at 714. In reaching this conclusion, the dissent made clear how the issue should be resolved for entireties property. It noted that entireties property represented the easier case, as "[i]t is true, of course, that tenancies by the entirety were held to be immune from federal tax sales on a theory different from that applied to homestead property like Mrs. Rodgers"—that neither spouse, unlike homesteaders, owned a share in the property. *Id.* at 720. And given "the absence of any evidence of congressional intent to the contrary," Congress's "deliberate choice to leave undisturbed the bar to tax enforcement created by a tenancy by the entirety" suggests that it did not mean to alter this common-law rule when the statute was first enacted. *Id.* Lastly, it concluded that the 1954 proposed amendments showed that the Senate "foiled an attempt by the House to extend the reach of federal tax liens to tenancies by the entirety." *Id.* at 719. For at the time, it observed, "existing law" "unequivocally" rejected the application of the federal tax collection laws to entireties property. *Id.* at 720 at n.11.

All things considered, the Court's precedents favor Sandy Craft. Not only do they carefully preserve the distinction between joint tenancies and entireties tenancies, but they also indicate that the eligible "property . . . belonging to" a taxpayer to which the lien may attach must be property that can be independently exchanged and that is not merely personal to the taxpayer. That test simply does not reach the Crafts' "sole" tenancy in their house.

III. AN EXPANSION OF THIS STATUTE SHOULD COME FROM CONGRESS, NOT THE COURTS.

Because this Court has long recognized the distinction between entireties property and joint tenancies in the tax field and because every court of appeals that has addressed this issue in the context of a traditional entireties estate has said that § 6321 does not reach such property, it would be exceedingly awkward suddenly to extend the statute to this setting. To the extent a change should be made at this late date, it ought to come from the legislature, which is in a better position to clarify how this new construction of the law would operate in practice.

In 1954, when the House proposed an amendment to § 6321 specifying that it would apply to entireties property, one of the concerns raised by the proposal was its impact on existing titles. The President of the Florida Title Association wrote the Senate to explain some of the difficulties of the legislation for a State like his that then recognized (and still recognizes) the entireties estate. The principal point of the letter was not to lobby for or against the bill, but to say that the legislation needed far more explanation. "[T]he act does not provide," the letter noted, "to what extent the claim of lien would exist nor how it is to be enforced nor how it may be released, and we believe it would vitally affect the method of title evidencing in the State of Florida and would materially and adversely affect the marketability of many titles." Hearings Before the Comm. on Finance, H.R. 8300, 83d Cong., Part 4 (Apr. 22-23, 1954) (Apr. 10, 1954 letter of Robert V. Workman). "It is the writer's view," the letter continued, "that if the Federal Government intends to claim a lien under [these] circumstances, the law should specifically provide the extent of the lien, the manner of its enforcement, and the manner of obtaining a release," and as well "the act should provide a waiver of the lien as affecting a bona fide purchaser for value or mortgagee who takes a deed or

mortgage from both the husband and wife while that relationship continues to exist." *Id.*

Mr. Workman's point is relevant not just to whether the 1954 amendment should have been adopted, but also to whether such a significant judicial change in the law ought to occur in the first place. While some of his concerns have been addressed since 1954, others have not. And still other questions are prompted by the Government's interpretation. Consider: Would the Government take the lien subject to the nondelinquent spouse's survivorship right, in which case any interest in the property (along with the lien that attaches to it) terminates upon the death of the delinquent spouse? If that were the case, would it not compel the IRS to seek immediate foreclosure in every case like this one, for fear that the lien interest could at any time suddenly terminate?

In addition, how does one determine the value of a present interest in entireties property when that interest is not only undivided but indivisible? And if such a calculation is possible, why would it not be the case that the Crafts would have been subject to the same rule if, like countless Americans, they placed the deed to their house in just one person's name—say Sandy's—and yet Don had full use of the house throughout his life? Likewise, does the attachment of the federal lien immediately convert a tenancy by the entirety into a joint tenancy or a tenancy in common since the husband and wife no longer have an equal indivisible right in the property? And, if so, does that mean state and private creditors could then reach the property?

There are in short countless questions raised by the Government's interpretation. And the inscrutable answers to all of them counsel against starting down this precipitous path. Better to leave the matter with Congress, which to date has conspicuously refused to alter the seven appellate court decisions rejecting this interpretation over the last 135 years.

IV. THE GOVERNMENT'S CONTRARY ARGUMENTS ARE MISTAKEN.

The United States makes several contrary arguments, all unpersuasive.

A. The Sixth Circuit Fully Appreciated The Distinct Roles Of State And Federal Law In Applying The Lien Statute.

In attacking the Sixth Circuit's decision, the Government first contests (Br. 16) the way the lower court framed the issue. It claims that the court mistakenly concluded that a State's definition of "property" could trump the federal definition of property under § 6321. Yet the Sixth Circuit did no such thing in *Craft I* and made that abundantly clear in *Craft II*. In *Craft I*, the court at the outset described the two-step analysis just the way the Government does here: "'[O]nce it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." Pet. App. 50a (quoting *National Bank of Commerce*, 472 U.S. at 722 (internal quotation omitted)). In *Craft II*, the court confirmed that "state law determines the rights a taxpayer has in property and federal law determines whether those rights constitute 'property' or 'rights to property'" under § 6321. Pet. App. 15a n.13 (citing *Drye*, 120 S. Ct. at 481). In applying this two-step process, the court concluded that "[b]ecause Michigan law does not recognize one spouse's separate interest in an entireties estate, a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate." Pet. App. 55a.

Also unavailing is the Government's related criticism (Br. 18-21) that the Sixth Circuit determined that state-law property "exemptions" may trump the federal lien statute. Like every court of appeals to address the issue and like this Court's own distinction between joint tenancies and entireties

tenancies in *Rodgers*, the court of appeals made clear that no exemption was needed "'because neither spouse possessed an independent interest in the property'" in the first place that would allow the lien to attach. Pet. App. 16a (quoting *Rodgers*, 461 U.S. at 702-03 n.31). As the court acknowledged, "'state law is inoperative'" once "'the requirements'" of the lien statute have been met. Pet. App. 50a (quoting *National Bank of Commerce*, 472 U.S. at 722 (internal quotation omitted)). But since the Government never satisfied those threshold requirements of the lien statute, the existence of an exemption under state law was analytically and practically beside the point.

For like reasons, the Government errs (Br. 20-21) in pointing to exemptions from the federal levy statute as proof that the lien statute extends to tenancies by the entirety. The levy statute, it is true, permits an administrative levy of "property or rights to property . . . belonging to" the taxpayer. 26 U.S.C. § 6334(c). And that law, it is also true, contains a list of thirteen specific exemptions (*e.g.*, wearing apparel, tools of a trade), which do not extend to tenancy-by-the-entirety estates. But that should not surprise anyone. Why exempt a *sui generis* interest in property to which private and public liens traditionally have never attached? Unless the threshold requirements of the law apply, there is nothing to exempt.

Nor is it true (Br. 20-21) that *Drye* held differently. The absence of an exemption for a disclaimed inheritance was relevant to *Drye* once it became clear that the heir had obtained separate and independent control over the assets of the estate (thereby meeting the definition of "property . . . belonging to" the taxpayer) *before* he disclaimed his right to the assets. Otherwise, interests with even the most attenuated value would be covered by the lien and levy statutes simply because they do not appear on the list of exemptions. *Drye* itself made clear that this is not what it meant. 528 U.S. 60 n.7 ("Nor do we mean to suggest that an expectancy that has

pecuniary value and is transferable under state law would fall within § 6321 prior to the time it ripens into a present estate."). And *Bess* proves that this is not what the Court meant. There the Court determined that the tax lien does not cover life insurance proceeds even though this form of property does not appear on the list of levy exemptions in § 6334 and even though several comparable forms of property (*e.g.*,annuity and pension benefits, workmen's compensation, unemployment benefits) do appear on that list.

B. The Government's Criticism Of "Legal Fictions" Is Misplaced.

The Government's next attack amounts to a variation on the same theme. It claims (Br. 22-25) that the Sixth Circuit "erred in relying on the legal fiction . . . that property held in a tenancy by the entirety" is indivisible and is "owned by the marital unit, rather than by the individual spouses." But the source of this criticism cannot possibly go to the impropriety of state-law legal fictions in general. For without them the law would come to a halt. Not just States, but the National Government as well, relies on them in assuring the supremacy of federal law, *see Ex Parte Young*, 209 U.S. 123 (1908), in limiting the federal liability of well-meaning but fallible corporate executives, *see First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (corporate veil doctrine), and in presuming astonishingly but necessarily that those who violate the law know the law, *see McBoyle v. United States*, 283 U.S. 25, 27 (1931). These fictions seem like farce when compared to the modest assumption under Michigan law that husband and wife become one, which in contrast to these other fictions requires little suspension of reality and by some accounts none at all. There is still a place in our legal system, it would seem, for States to allow brutally-mundane and blissfully-sacred couples alike to perceive themselves as one, and to be perceived by the law as one—at least when it comes to the real property they own. Surely a legal system that found a way to "split the atom

of sovereignty," *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)), then found a way to put it back together again by making "one out of many," can tolerate a similar perspective on marriage that predates Magna Carta.

Ultimately, in challenging this marital fiction, the Government presumably means to attack it in part, not in whole. The rub, then, is not with the State's recognition of marital unity but with its standing in the way of the Government's tax-collection prerogatives. State-law legal fictions, the argument goes, may not preempt the coverage of an otherwise-applicable federal law, for the same reason that state-law tax exemptions may not. That is true, but the point is inapplicable here.

The Court's tax cases preserve a careful line between state laws that preclude a property right from existing in the first instance and state laws that purport to disclaim or exempt that interest after the fact. The former are permissible; the latter are not. That the Government has pressed its "legal fiction" claim one case too far becomes clear when reconsidering the facts of *Irvine* and *Drye*. In *United States v. Irvine* the Court held that a state law allowing an individual to disclaim a gift would not force the Court to be "struck blind" to the fact that the transfer had already occurred and that federal law covered it before the disclaimer. 511 U.S. 224, 239-40 (1994). And *Drye* held that a state-law disclaimer could not retroactively undo a vested right in an estate that the taxpayer already held. Merely to recite the facts of these cases is to explain why they do not apply here. Michigan's view of entireties estates does not disclaim independent vested rights in property; it precludes them from coming into being in the first instance. *Long*, 277 Mich. at 517; *Nurmi*, 275 Mich. at 330; *Sanford*, 204 Mich. at 248-19.

C. The Government's Other Arguments Are Wrong.

Once the critiques of (1) the Sixth Circuit's formulation of the issue and (2) its treatment of Michigan "legal fictions" are put to rest, the answers to the Government's additional arguments fall into place. Far from ignoring the language of the statute (Br. 12-15), Sandy Craft's position fully respects it. Whether one considers the present interests of a spouse (*e.g.*, to use the property) or the future interest (*e.g.*, the right of survivorship), the problem is the same: Neither interest is divisible, neither interest "belongs to" the individual and neither interest accordingly may be attached as a cognizable separate and determinable right to property. For better or worse, a spousal interest in property anchored to the continuation of a marriage and to the unique, non-transferable status of being a spouse to that union does not lend itself to a lien applicable to "property or rights to property . . . belonging to" the taxpayer.

The Government's effort to shore up this argument (Br. 14-15) by invoking Takings and Due Process Clause decisions falls flat. It seems exceedingly unlikely that the Government means to concede, as opposed faintheartedly to hint, that both Clauses reach all "property" covered by the lien statute. But, at any rate, the proposition causes more problems for the Government than it solves. In the first place, it would mean that innocent spouses would have Takings claims against the United States whenever the lien statute diminished their interests in the property or destroyed their right to survivorship. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2463 (2001). In the second place, the existence of this alleged constitutional issue only confirms why the lien statute should be construed *not* to apply to traditional tenancies by the entirety. *See Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001); *Jones v. United States*, 529 U.S. 848, 857 (2000).

Also misplaced is the Government's footnoted reliance (Br. 25 n.14) on commentators. The primary author cited agrees that "[i]t has long been the rule that the federal tax lien does not attach to tenancy-by-the-entireties interests." Steve R. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-By-The-Entireties Interests*, 75 Ind. L.J. 1163, 1163 (Fall 2000); Steve R. Johnson, *Fog, Fairness and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 844 (Fall 1995) ("in the sixteen full bar states, the tax lien does not attach at all to entireties property and entireties interests"). And to the extent Professor Johnson disagrees with this policy, he acknowledges that "legislation holds more promise as the means by which to finally abolish the bar." 60 Mo. L. Rev. at 841. Nor, at any rate, has the Government accounted for myriad other experts, including most notably the drafter of the 1966 Federal Tax Lien Act, who agrees that "the interests of tenants by the entirety, which are confined to the husband-wife relationship, represent the one well-established sanctuary beyond the reach of the government's tax lien." William T. Plumb, Jr. & L. Hart Wright, *Federal Tax Liens*, 35 (ALI and ABA Jt. Comm. on Continuing Legal Educ. 1961); *see also id.*at 35-36 (2d ed. 1967) (same); *id.* at 37-38 (3d ed. 1972) (same).

The Government further suggests (Br. 28-29) that the lower-court record is more equivocal than the majority and dissent indicated in *Rodgers*. As noted above, the D.C., Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits all provide that the tax lien statute does not reach entireties property in those States where the tenancy is recognized and where neither spouse has a divisible interest in the property. In the face of this record, the Government suggests (Br. 28) that other federal courts have applied the federal tax lien differently. The cited cases, however, simply deal with States that, in the aftermath of the Married Women's Property Acts, took different paths in modifying their tenancy-by-the-entirety

laws. Indeed, in seeking review in this case, the Government did not argue at the certiorari stage that the Sixth Circuit's interpretation of the tax-lien statute conflicted with *any* lower-court decisions. That many States have not followed Michigan's example, instead defining the tenancy differently or abandoning it altogether, does not change matters. The federal tax lien takes the States' definitions of interests in property as it finds them. This familiar rule has been applied in a wide range of settings, and no good reason has been offered for abandoning it here. *Cf., e.g., Burks v. Lasker*, 441 U.S. 471, 478 (1979) (authority of independent corporate directors); *Agency Holding Co. v. Malley-Duff & Assoc.*, 483 U.S. 143, 147 (1987) (limitations periods); *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 220 (1997) (banking law).

In seizing on these different state-law definitions as proof that Sandy Craft's position will "create irrationally disparate treatment of similarly situated taxpayers" (Br. 25), the Government does not overcome this flaw. Again, a federal law that does not itself create property rights, but relies on 50 different state laws to create those property interests, will of course lead to differential treatment of taxpayers who choose to live in different States. Nor does the Government's use of constitutionally-evocative language change matters. The United States has never attacked Michigan's law on equal protection grounds; it cannot do so here. And, at any rate, the joint tenancy and the tenancy by the entirety are different. They reflect not only a difference in definition but a difference in kind.

At the same time that it says fewer and fewer States still recognize the tenancy by the entirety, the Government argues (Br. 30-32) that the Michigan law will lead to rampant tax evasion and obstruction. Not so. For one, the 135-year reign of the current understanding of the federal tax lien has caused no such problems. Indeed, the IRS manuals contain several suggestions on how to avoid the possibility. *See, e.g.*, IRM § 5.17.14.3.8 (suggesting that transferee liability principles,

including fraudulent conveyance laws, should be used to reach property transferred to a tenancy by the entirety). *See also* IRM § 5.6.1.2.3(4) (discussed in General Litigation Bulletin 200140081) (Oct. 5, 2001) (suggesting that a consensual lien can be used as a means of securing the government's right to "collect property the federal tax lien does not attach to, such as real property held as a tenancy by the entirety"). For another, a legislature fearful of inter-spousal tax evasion would not have created an unlimited marital deduction from the gift tax and would not have said that entireties property is specifically excluded from the Fair Debt Collection Act, 26 U.S.C. § 2523(a); 28 U.S.C. §§ 3301, 3010(a).

For still another reason, taxpayers like Sandy Craft must take the bitter with the sweet. Just as state law gave the Crafts a property interest that was not attachable, it also supplied the Government with a fraudulent conveyance theory that ultimately led to the return of over $6,000 to the Government and could have led to the return of the remaining $50,000. *McCaslin v. Schouten*, 294 Mich. 180 (1940) (under Michigan law, spouse cannot hide funds by investing in unattachable property). *See also* Pet. App. 27a-32a, 81a-85a, 86a. That was exactly the purpose of *Craft II*—to let the United States prove on remand (to the extent it could) that Don Craft had acted inappropriately. And that is exactly the argument the Government is making in another Michigan case. *See* Br. 31 (citing *Hatchett v. IRS*, 126 F. Supp. 2d 1038 (E.D. Mich. 2000), appeal docketed, No. 00-1645 (6th Cir. June 13, 2000)). In the end, the Government has ample means at its disposal to ensure that those with guile and those without do not evade their tax obligations.

All of this is not to say that Congress lacks the power to preempt a state-law fiction that to date has barred cognizable rights to property from coming into existence. That is just what happened in *Tyler v. United States*, 281 U.S. 497 (1930). At stake in *Tyler* was the constitutionality (under the Fifth, Fourteenth and Sixteenth Amendments) of a portion of the

estate tax. In conspicuous contrast to the lien statute, Congress in 1916 specifically extended the estate tax to tenancies by the entirety. As the Court noted, that legislation had the effect of assessing the realities of marital property differently from the way Maryland and Pennsylvania had assessed them. Thus, despite the "amiable fiction" under the laws of those States that two become one after marriage, the Court held that the "power of taxation" of the United States "is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions," and that the federal "lawmaker . . . is free to ignore them and adopt his own." *Id.* at 502-03. Congress could have done the same thing here. But it did not, proving that the real fiction here is the claim that improper State action, as opposed to Federal inaction, is to blame for the invalidity of this lien.

CONCLUSION

The Sixth Circuit's decision should be affirmed.

Respectfully submitted,

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December 2001

APPENDIX A
HISTORY OF FEDERAL TAX LIEN STATUTE

Year	Cite	Text
1865	Act of Mar. 3, 1865, ch. 78 13 Stat. 469, 470-71	"And if any person, bank association, company, or corporation, liable to pay any duty, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interests penalties, and costs that may accrue in addition thereto, upon all property and rights to property;...."
1866	An Act to reduce Internal Taxation..., ch. 184 14 Stat. 98, 107	"And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company or corporation."

Year	Cite	Text
1879	An Act to amend the laws relating to internal revenue, ch. 125 20 Stat. 327, 330	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment-list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person."
1913	An Act to Amend Section 3186 of the Revised Statutes of the United States, ch. 166 37 Stat. 1016	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with interest, penalties, and costs that may accrue in addition thereto upon all property belonging to such person...."

Year	Cite	Text
1925	Act to Amend Section 3186 of the Revised Statutes, ch. 344 43 Stat. 994	"That if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person..."
1928	An Act to reduce and equalize taxation, provide revenue, and for other purposes, ch. 852 45 Stat. 791, 875	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

Year	Cite	Text
1939	Internal Revenue Code of 1939, ch. 36 53 Stat. 444, 448	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."
1954	Internal Revenue Code of 1954, ch. 64 68a Stat. 775, 779 26 U.S.C. § 6321	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

APPENDIX B

STATES RECOGNIZING TRADITIONAL TENANCY BY THE ENTIRETY

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Delaware	Del. Code Ann., tit. 25, § 309; tit. 12, § 703; *Citizens Sav. Bank v. Astrin*, 44 Del. 451, 455 (Del. Super. Ct. 1948)	*Internal Revenue Service v. Gaster*, 42 F.3d 787, 791 (3d Cir. 1994)
District of Columbia	*Alpher v. Preston (Estate of Wall)*, 440 F.2d 215, 219 (D.C. Cir. 1971)	*Benson v. United States*, 442 F.2d 1221, 1225 (D.C. Cir. 1971)
Florida	Fla. Stat. Ann. §§ 689.11; 708.10; *Hunt v. Covington*, 145 Fla. 706, 708 (1941)	*United States v. American National Bank of Jacksonville*, 255 F.2d 504, 507 (5th Cir.), *cert. denied*, 358 U.S. 835 (1958)

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Hawaii	Haw. Rev. Stat. § 509-1; § 509-2; *Sawada v. Endo*, 57 Haw. 608, 615-16 (1977)	*Theo. H. Davies & Co., Ltd. v. Long & Melone Escrow, Ltd.*, 876 F. Supp. 230, 233-34 (D. Haw. 1995)
Illinois	Ill. St. Ch. 735 § 5/12-112; *Premier Property Mgmt. v. Chavez*, 191 Ill. 2d 101, 109 (2000)	*United States v. Davenport*, 106 F.3d 1333, 1336-37 (7th Cir. 1997)
Indiana	Ind. Code § 32-4-2-1; *Myler v. Myler*, 137 Ind. App. 605, 609 (1965)	*United States v. Davenport*, 106 F.3d 1333, 1336-37 (7th Cir. 1997) (Illinois law)
Maryland	Md. Real Prop. Code Ann. § 4-108; *Watterson v. Edgerly*, 40 Md. App. 230, 236-37 (1978)	*Pitts v. United States*, 946 F.2d 1569, 1571-72 (4th Cir. 1991) (Virginia law involving levy)

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Michigan	M.C.L. Ann. § 557.81; *DeYoung v. Mesler*, 373 Mich. 499, 503-04 (Mich. 1964)	*Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971)
Missouri	Mo. Ann. Stat. § 442.025; *Hanebrink v. Tower Grove Bank & Trust Co.*, 321 S.W.2d 524 (Mo. Ct. App. 1959)	*United States v. Hutcherson*, 188 F.2d 326, 330 (8th Cir. 1951)
North Carolina	N.C. Gen. Stat. §§ 39-13.3 to 39-13.6; *L & M Gas Co. v. Leggett*, 273 N.C. 547, 550 (1968)	*Pitts v. United States*, 946 F.2d 1569, 1571-72 (4th Cir. 1991) (Virginia law involving levy)

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Ohio	*Central Nat. Bank of Cleveland v. Fitzwilliam*, 12 Ohio St.3d 51, 53 (1985), *superseded by* Ohio Rev. Code §§ 5302.17, 5302.21	*Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971) (Michigan law)
Pennsylvania	Pa. Stat. Ann., tit. 69, § 541; *Stauffer v. Stauffer*, 465 Pa. 558, 576 (1976)	*Raffaele v. Granger*, 196 F.2d 620, 622 (3d Cir. 1952)
Vermont	Vt. Stat. Ann. tit. 27 § 2; *Cooper v. Cooper*, 783 A.2d 430, 445 (Vt. 2001)	
U.S. Virgin Islands	*Masonry Prods., Inc. v. Tees*, 280 F. Supp. 654, 656 (D.V.I. 1968)	*Raffaele v. Granger*, 196 F.2d 620, 622 (3d Cir. 1952)

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Virginia	*Rogers v. Rogers*, 257 Va. 323, 326 512 S.E.2d 821, 822 (1999); *Vasilion v. Vasilion*, 192 Va. 735, 742-43 (1951)	*Pitts v. United States*, 946 F.2d 1569, 1571-72 (4th Cir. 1991) (involving levy); *Moore v. Glotzbach*, 188 F. Supp. 267, 268 (E.D. Va. 1960)
Wyoming	Wyo. Stat. Ann. § 34-1-140; *Ward Terry and Co. v. Hensen*, 75 Wyo. 444, 461-62 (1956)	*Talbot v. United States*, 850 F. Supp. 969, 975 (D. Wyo. 1994)

No. 00-1831

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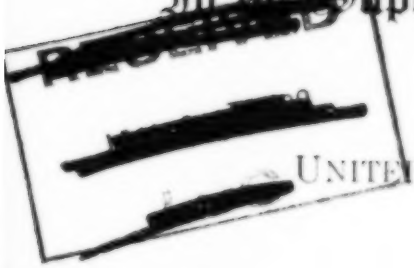
In the Supreme Court of the United States



UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 00-1831

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA L. CRAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I. A SPOUSE'S INTEREST IN A TENANCY BY THE ENTIRETY IS A VALUABLE, LEGALLY PROTECTED INTEREST THAT IS SUBJECT TO THE FEDERAL TAX LIEN.

1. This Court has long held that the broad text of the federal tax lien "reveals on its face" that Congress meant to reach "every species of right or interest protected by law and having an exchangeable value." *Drye* v. *United States*, 528 U.S. 49, 56 (1999) (quoting *Jewett* v. *Commissioner*, 455 U.S. 305, 309 (1982)). See also *United States* v. *National Bank of Commerce*, 472 U.S. 713, 719-720 (1985). The valuable, legally-protected rights of a tenant by the entirety come within the scope of this broad provision.

Each spouse has a present interest in entirety property that entitles him to reside on the property, to exclude third

parties from the property, to share in the profits of the property, to join or refuse to join in the mortgage, lease, or sale of the property and, upon the sale, individually to receive half the proceeds. Pet. Br. 14 (citing cases); Mich. Comp. Laws Ann. § 554.872(g), (i) (West Supp. 1997), recodified at *id.* § 700.2901(g), (i) (West Supp. 2001); *id.* § 557.71 (West 1988).[1] Furthermore, upon a divorce, the tenants by the entirety become tenants in common, and each has the right to bring an action for partition and sale. See *id.* § 552.102 (West 1998 & Supp. 2001). Each spouse also has a future interest in a tenancy by the entirety, which is the right to receive the property in fee simple absolute upon the death of the other spouse. *Id.* § 554.872(g) (West Supp. 1997), recodified *id.* § 700.2901(g) (West Supp. 2001).

These valuable interests are expressly described as "property" rights under state law (Mich. Comp. Laws Ann. § 700.2901(i) (West Supp. 2001)), and the Michigan Supreme

[1] When entireties property is sold, "the spouses are generally each entitled to a one-half interest [in the proceeds] as tenants in common" unless they "reinvest[] in other similar entireties property within a reasonable period of time." *In re Wickstrom*, 113 B.R. 339, 349 (Bankr. W.D. Mich. 1980); see also *In re Jackson*, 92 B.R. 211, 214 (W.D. Mich. 1989). When the property involved in this case was sold, and the tenancy by the entirety thereby terminated, the taxpayer's "future right to half of the proceeds became a present interest" to which the tax lien continued to attach. Pet. App. 69a (Ryan, J.).

Moreover, in the district court, respondent acknowledged that the tenancy by the entirety had been terminated even *prior* to the sale, when the property was quitclaimed by Don Craft to respondent in 1989. See Pet. App. 3a; J.A. 50-51. That quitclaim, of course, did not destroy the federal lien, which passes with the property and also attaches to the proceeds. See, *e.g.*, *Drye* v. *United States*, 528 U.S. at 53-54; *United States* v. *Bess*, 357 U.S. 51, 57 (1958). "[W]here an estate by the entirety is severed each spouse is deemed entitled to an undivided one-half interest in the equity of the property." *In re Ignasiak* 22 B.R. 828, 830 (Bankr. E.D. Mich. 1982).

Court has held that "each spouse" holding an interest in a tenancy by the entirety has "a significant interest in property" that is protected by the Due Process Clause of the United States Constitution. *Dow* v. *State*, 396 Mich. 192, 204, 240 N.W.2d 450, 453 n.10, 456 (1976) ("each spouse" is entitled to "separate notice"). These valuable, legally-protected rights constitute "property or rights to property" within the broad scope of the federal tax lien. See *Drye* v. *United States*, 528 U.S. at 56.

2. a. Respondent insists, however, that property held in a tenancy by the entirety belongs to the "marital estate" and that "all that belongs to each spouse is a present right to share use of the property with the other (so long as the marriage lasts) and a future right" of survivorship. Resp. Br. 15. Even if all that belonged to each spouse were the present right to share the use of the property, that would be a sufficient interest to qualify as "property" or "rights to property" for purposes of Section 6321 of the Internal Revenue Code. See Pet. Br. 14-15, 18. A spouse's present interest in entirety property, however, consists of far more than simply the right to share the use of the property: "[a] husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety." Mich. Comp. Laws Ann. § 557.71 (West 1988). A spouse's separate right to receive *half the income or rents* from real or personal property and *half the proceeds upon the sale* of the property is a right that has an obvious "pecuniary value" and is therefore subject to the federal tax lien. *Drye* v. *United States*, 528 U.S. at 60 n.7.

The present case involves the enforcement of the federal tax lien against the delinquent spouse's individual right to receive half of the proceeds upon the sale of the property. See Pet. App. 46a-47a. The application of the tax lien to the valuable right of the delinquent spouse to receive his 50%

share of the proceeds of the sale of the property falls squarely within the precedents of this Court—for it is well established that the right to receive money is a "property" right. *Drye* v. *United States*, 528 U.S. at 58.

b. Because the property involved in this case has been sold, this case does not also concern the application of the federal tax lien against each spouse's *future* interest in entirety property. It is well established, however, that a right of survivorship is a species of "property" or "rights to property" to which the federal tax lien properly attaches. A right of survivorship is a common property right; it exists both for tenancies by the entirety and for other types of joint and separate ownerships. For example, in *O'Hagan* v. *United States*, 86 F.3d 776, 784 (1996), the Eighth Circuit held that the United States has "a valid lien on Mr. O'Hagan's survivorship interest" in jointly owned Minnesota homestead property. The court emphasized that the federal lien in the right of survivorship "provides protection for the government without affecting Mrs. O'Hagan's interests." *Ibid.* (citing W. Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L. J. 605, 638 (1968)). See also *In re Arango*, 992 F.2d 611, 613 (6th Cir. 1993); *Napotnik* v. *Equibank & Parkvale Savings Ass'n*, 679 F.2d 316, 319 (3d Cir. 1982); *United States* v. *Jones*, 877 F. Supp. 907, 917 (D.N.J.) (the lien in the taxpayer's interest in jointly held property is "subject to [the] right of survivorship" of the other owner), aff'd, 74 F.3d 1228 (3d Cir. 1995) (Table).[2]

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[2] In a variety of situations, courts have concluded that a conditional right to receive property in the future constitutes a valuable, legally protected right to which the federal tax lien applies. See, *e.g.*, *Leuschner* v. *First W. Bank & Trust Co.*, 261 F.2d 705, 707 (9th Cir. 1958) (citing Restatement of Trusts § 157 (Supp. 1948) (expectation of receiving distributions from a spendthrift trust); *In re Rosenberg's Will*, 308 N.Y.S.2d 51, 57 (N.Y. Surr. 1970) (a trust remainder contingent on surviving to the age of fifty is subject to the federal tax lien). The court explained in *In re Rosenberg's Will* that "the federal tax lien attaches" to "future" as well as present interests because "the statute * * * provides that the tax lien shall be a lien "'upon all property and rights to property'" and "'[r]ights to property include future rights whether equitable, contingent or vested.'" *Ibid.*

Respondent offers no authority for her unsubstantiated assertion (Resp. Br. 16) that the right of survivorship is "too ephemeral" to be subject to the tax lien.[3] In *Drye* v. *United States*, 528 U.S. at 53, 61, this Court held that the ephemeral right of an heir to disclaim (or not disclaim) an intestate estate within the nine months following the decedent's death is subject to the federal tax lien because it is a valuable and legally protected right. Here, as in *Drye*, the obvious economic reality is that the taxpayer's interest in the property is a valuable and legally protected interest.[4] As numerous

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[3] Contrary to respondent's contention (Resp. Br. 39), Prof. Plumb did not condone the immunity of entirety property from the federal tax lien. Instead, he characterized this immunity as a "privileged sanctuary * * * [that] would be difficult enough to justify [even] if it were confined to homestead property * * *." W. Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L.J. 605, 636 (1968). Prof. Plumb emphasized that "the right to use and enjoy the property, to share in its income, and to take the whole if he or she survives" is a valuable right belonging to each spouse in a tenancy by the entirety, and that "some way should be found to apply" those "tangible property rights" to the tax liability of the defaulting spouse. *Id.* at 637.

[4] The two concurring judges in the decisions below acknowledged that the right of survivorship in a tenancy by the entirety is "a contingent future interest" that constitutes a species of property to which the federal tax lien properly attaches. Pet. App. 41a, 61a-63a. See *id.* at 69a (Ryan, J.) (Under "established precedent," "Don Craft had a separate, attachable, future interest in the tenancy by the entirety.").

An early Michigan case states in *dicta* that "the right of survivorship is merely an incident of an estate by entirety and does not constitute a remainder, either vested or contingent." *Sanford* v. *Bertrau*, 204 Mich. 244, 248, 169 N.W. 880, 881 (1918). Recent Michigan authority, however, establishes that the right of survivorship constitutes an interest in "prop-

courts have emphasized (*Tillery* v. *Parks*, 630 F.2d 775, 777 (10th Cir. 1980) (quoting *United States* v. *Overman*, 424 F.2d 1142, 1145 (9th Cir. 1970))):

> [A]ll that section 6321 requires is that the interest be "property" or "rights to property." It is of no statutory moment how extensive may be those rights under state law, or what restrictions exist on the enjoyment of those rights.

c. Relying on what has been described as an "amiable fiction of the common law" (*Tyler* v. *United States*, 281 U.S. 497, 503 (1930)), respondent asserts (Resp. Br. 7, 15, 28) that an interest in entireties property is owned by the marital unit rather than by the individual spouses acting collectively and is therefore immune from the federal tax lien. As discussed in our opening brief (Pet. Br. 22-24), however, this Court has often emphasized that federal tax law is not "struck blind" by state legal fictions concerning property ownership. *Drye* v. *United States*, 528 U.S. at 59; *United States* v. *Irvine*, 511 U.S. 224, 240 (1994). Indeed in *Tyler* v. *United States*, 281 U.S. at 503, the Court expressly rejected

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erty" for purposes of state law. See Mich. Comp. Laws Ann. § 554.872(g), (i) (West Supp. 1997), recodified *id.* § 700.2901(g), (i) (West Supp. 2001); *Rogers* v. *Rogers*, 136 Mich. App. 125, 135, 356 N.W.2d 288, 293 (1984). Cf. *Albro* v. *Allen*, 434 Mich. 271, 275, 454 N.W.2d 85, 88 (1990). In any event, the proper characterization of a right of survivorship as "property" or "rights to property" for the purposes of the federal tax lien is a question of federal, not state, law. *Drye* v. *United States*, 528 U.S. at 58. "It is not material that the economic benefit to which the [taxpayer's] right pertains is not characterized as 'property' by local law." *Id.* at 58 n.5 (quoting W. Plumb, *Federal Tax Liens* 27 (3d ed. 1972)). "Once it has been determined that state law creates sufficient interests in the taxpayer to satisfy the requirements of the statute, state law is inoperative, and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 722 (1985) (internal quotation marks omitted). See also Pet. Br. 16-17.

the proposition that federal tax law is bound by the "amiable fiction" that entirety property is owned by the marital unit rather than by the spouses. The Court held in *Tyler* that the "artificial rules" of state law that ascribe ownership of the property to the marital unit do not obscure the reality that each spouse holds individual rights and interests in the property to which the provisions of federal law may directly apply. *Id.* at 503-504.[5] For the reasons detailed in our opening brief, the reasoning of *Tyler* applies directly to the present case. Pet. Br. 23-25.

II. RESPONDENT ERRS IN HER INTERPRETATION OF THE RELEVANT DECISIONS OF THIS COURT AND IN HER INTERPRETATION OF THE LEGISLATIVE HISTORY OF THE FEDERAL TAX LIEN STATUTE.

1. Respondent contends (Resp. Br. 14-15) that the term "property" in Section 6321 should be given a limited definition that she would draw from nineteenth century dictionaries. That argument, however, ignores the numerous decisions of this Court that have clearly held that "[t]he statutory language 'all property and rights to property,' appearing in § 6321 * * * is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. at 719-720. Accord, *Drye* v. *United States*, 528 U.S. at 56. See also *Glass City Bank* v. *United*

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[5] In *Tyler*, the Court explained that, "[b]efore the death of the husband * * *, the wife had the right to possess and use the whole property, but so, also, had her husband." 281 U.S. at 503. "At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment * * *." *Id.* at 504. "Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite *accessions* to the property rights of the other." *Ibid.* (emphasis added).

States, 326 U.S. 265, 267 (1945) ("Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.").

Respondent further incorrectly asserts that the "'belonging to' language in the [federal tax lien] statute reenforces" a narrow understanding of the statute.[6] Resp. Br. 15. This statutory language does not bear the weight that respondent would place on it. What "belongs to" a taxpayer who holds entirety property are the actual rights and interests in such property that exist under Michigan law—rights that we have described in detail both in our opening brief (Pet. Br. 13-15) and at pages 1-3, *supra*. Respondent makes no effort in her brief to refute our description of the ample rights that each spouse possesses in entirety property under Michigan law. Instead, respondent simply ignores this fundamental issue entirely.

2. Respondent urges that, when Congress first enacted the statutory predecessor of Section 6321 in 1866, "it was well accepted that creditors could not place liens on real property owned by the entireties to satisfy the debt of one member of the marital unit." Resp. Br. 16. Respondent's

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[6] The statute imposes the federal tax lien "upon all property and rights to property, whether real or personal, belonging to" the taxpayer. 26 U.S.C. 6321. Respondent repeatedly quotes the words "property * * * belonging to the taxpayer" (Resp. Br. 1, 10, 21, 27, 31, 35) using the ellipsis to omit the phrase "or rights to property" that precedes "belonging to the taxpayer" in the tax lien statute. The additional phrase—"and rights to property"—that respondent omits, makes clear that a taxpayer need not have an exclusive or unrestricted ownership for the tax lien to apply. As the court explained in holding that the federal tax lien attaches to the taxpayer's interest in a spendthrift trust in *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173, 176 (6th Cir. 1996), "when Congress says, as it has done in § 6321, that an unpaid tax 'shall' constitute a lien upon 'all' of a delinquent taxpayer's property or rights to property, it follows that the tax is a lien both on property that is alienable under state law and on property that is not."

reliance on the rights of creditors under state law, however, is plainly misconceived.[7] This Court has repeatedly held that Congress did *not* intend to incorporate state-law exemptions and that such exemptions cannot prevent the attachment of the federal tax lien. See, *e.g.*, *Drye* v. *United States*, 528 U.S. at 59 ("exempt status under state law does not bind the federal collector"); *United States* v. *Rodgers*, 461 U.S. 677, 701 (1983) (the Supremacy Clause of the Constitution "provides the underpinning for the Federal Government's right to sweep aside state-created exemptions"); *United States* v. *Bess*, 357 U.S. 51, 57 (1958) ("state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States"). See also *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971) ("there is no room" in the federal statutes "for automatic exemption of property that happens to be exempt from state levy under state law"). See Pet. Br. 19-21.

3. Although the basic text of what is now the federal tax lien statute was first enacted in 1866, it appears that the earliest decision that addresses whether that statute applies to tenancies by the entirety was issued in 1939. Resp. Br. 23 (citing *Shaw* v. *United States*, 94 F. Supp. 245 (W.D. Mich.)).[8]

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[7] Respondent has cited only one state court decision (and no federal decision) involving a state-law exemption for tenancies by the entirety that predates the enactment of the 1866 predecessor of the federal tax lien statute. Resp. Br. 18 (citing *Thomas* v. *DeBaum*, 14 N.J. Eq. 37 (N.J. Ch. 1861)).

[8] Prior to the burgeoning application of the federal income tax during the first third of the 20th Century, there were relatively few occasions for individuals—who might own property in a tenancy by the entirety—to be subject to the federal tax lien. In this context, there is no basis for (and no relevance to) respondent's assertion (Resp. Br. 23) that the *Shaw* case—which was decided in 1939 and involved taxes due for some preceding year—was the first time that the United States took the position that the tax lien reaches such property. Certainly nothing in the decision in that case supports that assertion. Instead, it appears probable that the United

It was not until the early 1950's that two courts of appeals held that the federal tax lien does not apply to tenancies by the entirety. *United States* v. *Hutcherson*, 188 F.2d 326 (8th Cir. 1951); *Raffaele* v. *Granger*, 196 F.2d 620 (3d Cir. 1952). Respondent errs in claiming (Resp. Br. 23-24) that Congress ratified these early and narrow interpretations of the statute by not expressly rejecting them in enacting the Internal Revenue Code of 1954.

a. As part of the enactment of the 1954 Code, Congress considered but did not adopt a proposed amendment to Section 6321 that would have added a parenthetical phrase to the statute to clarify that the federal tax lien attaches to "property and rights to property" of a delinquent taxpayer "(including the interest of such person as tenant by the entirety)." H.R. 8300, 83d Cong., 2d Sess. § 6321 (1954). The Senate rejected this proposal, not because of any stated disagreement with it, but because it was "not clear what change in existing law would be made by the parenthetical phrase." S. Rep. No. 1622, 83d Cong., 2d Sess. 575 (1954).[9] Respondent nevertheless contends that the failure of Congress to enact this clarifying amendment should be understood as an expression of a legislative intent to ratify the decisions that had then recently held that the federal tax lien does not attach to entirety property. Resp. Br. 25.

States had then (as now) routinely applied its lien to jointly owned property. The district court in *Shaw*, while acknowledging that "the rule in a number of states is to the contrary," rejected the government's claim only because "the Supreme Court of Michigan" had adopted the rule "that no portion of an estate by the entireties may be subjected to a lien for the individual indebtedness of either spouse." 94 F. Supp. at 246.

[9] The Senate Report stated (S. Rep. No. 1622, *supra*, at 575):

> It is not clear what change in existing law would be made by the parenthetical phrase [suggested by the House]. The deletion of the phrase is intended to continue existing law.

It is well established, however, that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). See also *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute"); *United States* v. *Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring ("Congress cannot express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.").

This Court has, moreover, expressly rejected the argument that "Congress' unwillingness to amend [the statute] in response to * * * [lower court] decisions is evidence that Congress believed that those opinions accurately interpreted [the statute's] scope." *California Division of Labor Standards Enforcement* v. *Dillingham Construction., N.A., Inc.*, 519 U.S. 316, 331 n.8 (1997). Accord, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. at 186. The absence of a statutory amendment to correct the two appellate decisions that had incorrectly interpreted Section 6321 thus clearly does not support the assertion that Congress thereby ratified those decisions.

b. Moreover, in *United States* v. *Rodgers*, 461 U.S. at 702-704 n. 31, this Court addressed and rejected the identical argument that respondent raises here. As the Court explained at length in *Rodgers*, the legislative history of the proposed 1954 amendment to Section 6321 refutes the contention that Congress was of the view that the federal tax lien does not attach to an interest in entirety property. The Court emphasized in *Rodgers* that the House Report de-

scribed the proposed amendment as merely a "clarification" of, rather than a change in, existing law. *Id.* at 703-704 n.31; see H.R. Rep. No. 1337, 83d Cong., 2d Sess. A406 (1954). Indeed, the clarifying amendment drafted by the House Ways and Means Committee clearly reflected the assumption that each spouse *has* a "right to property" in a tenancy by the entirety, for it appended the parenthetical "(including the interest of such person as tenant by the entirety)" to that phrase. See H.R. 8300, *supra*, § 6321.

And, as the Court stated in *Rodgers*, "the Senate rejected that clarification, not necessarily because it disagreed with it, but more likely because it found it superfluous." 461 U.S. at 704 n.31. As the Court concluded in *Rodgers*, the legislative history of the 1954 Code reflects, if anything, the assumption by Congress that the federal tax lien attaches to an interest in a tenancy by the entirety without the necessity of an amendment. *Ibid.*

4. Respondent errs in claiming that the "markedly-broader coverage of property interests susceptible to foreclosure" under the provisions of Section 7403 demonstrates that Section 6321 "was not designed to cover all conceivable interests in property." Resp. Br. 21. In the first place, this argument simply ignores the decisions of this Court holding that the statutory language "all property and rights to property" in Section 6321 "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. at 719-720. Accord, *Drye* v. *United States*, 528 U.S. at 56; *Glass City Bank* v. *United States*, 326 U.S. at 267.

Moreover, the wording of the foreclosure provisions of Section 7403 does not support respondent's contention. Section 7403 permits the government to bring suit "to enforce the lien" of Section 6321 or "to subject any property, of whatever nature, of the delinquent, or in which he has any

right, title, or interest, to the payment of such tax or liability." 26 U.S.C. 7403(a). Respondent claims (Resp. Br. 21) that the latter phrase is broader than the text of Section 6321 and that Section 6321 therefore must *not* reach "every interest in property that a taxpayer might have" (*United States* v. *National Bank of Commerce*, 472 U.S. at 720). As this Court has explained, however, the additional language in Section 7403 addresses situations that do not involve the government's lien, for it "contemplate[s], not merely the sale of *the delinquent taxpayer's own interest, but* the sale of the entire property * * * and *the recognition of third-party interests* * * *." *United States* v. *Rodgers*, 461 U.S. at 694 (emphasis added).

For example, under Section 7403, the government may seek a judicial sale of homestead property in which both the taxpayer and the nonliable spouse have an interest.[10] *United States* v. *Rodgers*, 461 U.S. at 709-711. Section 7403 also enables the government to satisfy a taxpayer's tax liability from property that the taxpayer has fraudulently conveyed to a third party. See, *e.g.*, *United States* v. *Bryant*, 15 F.3d 756, 757 (8th Cir. 1994); *Shades Ridge Holding Co.* v. *United States*, 888 F.2d 725, 727 (11th Cir. 1989), cert. denied *sub nom. Fiorella* v. *United States*, 494 U.S. 1027 (1990); *United States* v. *Smith*, 950 F. Supp. 1394, 1398 (N.D. Ind. 1996). And, Section 7403 enables the government to collect taxes in cases where the taxpayer has property but the federal tax lien is procedurally invalid or where there is as yet no lien because the tax has not yet been assessed.[11] The specialized

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[10] Of course, the nonliable spouse is entitled to compensation for her property interest. *United States* v. *Rodgers*, 461 U.S. at 702.

[11] A federal tax lien does not arise until "the assessment is made." 26 U.S.C. 6322. See also 26 U.S.C. 6203; 26 C.F.R. 301.6203-1. Taxpayers have frequently challenged liens by making procedural challenges to the validity of the assessment. See, *e.g.*, *Hefti* v. *IRS*, 8 F.3d 1169, 1172 (7th Cir. 1993); *Gentry* v. *United States*, 962 F.2d 555, 557 (6th Cir. 1992);

wording employed in 26 U.S.C. 7403 thus does not support respondent's novel assertion—contrary to this Court's precedent—that the term "property" in Section 6321 has a narrow scope.

5. a. Respondent incorrectly asserts that *United States* v. *Drye* holds that a property interest "must" (Resp. Br. 27) be pecuniary in nature, "must" have ripened into a present estate, and "must" be capable of transfer by the taxpayer to another before the federal tax lien can apply. This Court did not adopt the rules that respondent proposes.

Instead, in *Drye*, the Court stated that, "in determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' the important consideration is the breadth of the control the [taxpayer] could exercise over the property." *Drye* v. *United States*, 528 U.S. at 61 (internal quotation marks omitted). The Court examined the taxpayer's rights under state law and concluded that his "unqualified right to receive the entire value of his mother's estate * * * or to channel that value to his daughter" indicated that he possessed a sufficient "right to property" for the federal tax lien to attach. At the same time, the Court emphasized that (*id.* at 60 n.7):

> we do not mean to suggest that transferability is essential to the existence of "property" or "rights to property" under that section. For example, although we do not here decide the matter, we note that an interest in a spendthrift trust has been held to constitute "'property'

Geiselman v. *United States*, 961 F.2d 1, 5-6 (1st Cir.) (per curiam), cert. denied, 506 U.S. 891 (1992); *Hughes* v. *United States*, 953 F.2d 531, 535 (9th Cir. 1992); *United States* v. *Chila*, 871 F.2d 1015, 1017 (11th Cir.), cert. denied, 493 U.S. 956 (1989). Some challenges have been successful. See *Huff* v. *United States*, 10 F.3d 1440, 1445-1446 (9th Cir. 1993), cert. denied, 512 U.S. 1219 (1994); *Brafman* v. *United States*, 384 F.2d 863, 867 (5th Cir. 1967).

> for purposes of § 6321" even though the beneficiary may not transfer that interest to third parties. See *Bank One*, 80 F.3d, at 176.[12]

The text of the Court's decision in *Drye* also refutes respondent's further contention that a property interest cannot be subject to the federal tax lien unless it is "a non-personal interest that others (besides the taxpayer) may equivalently enjoy." Resp. Br. 27. The Court characterized the right to inherit in *Drye* as "a right that is indeed personal and not marketable" but nevertheless held that this valuable and legally protected right is subject to the federal tax lien. 528 U.S. at 60.

b. Respondent has also seriously erred in her description of this Court's decision in *United States* v. *Rodgers*, *supra*. In *Rodgers*, the Court held that a federal tax lien could be foreclosed on the interest of a delinquent taxpayer in homestead property even though, under state law, such property could not be mortgaged, sold or abandoned without the consent of the other spouse. 461 U.S. at 685. Respondent asserts that *Rodgers* differs from the present case because the spouses in that case held "separate right[s]" to the property. Resp. Br. 28. This Court, however, plainly did not adopt that rationale in *Rodgers*.[13] Instead, the Court

[12] The case cited by the Court is *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173 (6th Cir. 1996). Other cases have also held that valuable, legally protected interests in property are subject to the federal tax lien even if the taxpayer could not immediately transfer those interests to a third party. See, *e.g.*, *21 West Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1986); *United States* v. *Rye*, 550 F.2d 682, 684-685 (1st Cir. 1977). See also pages 3-4 & note 2, *supra*.

[13] In any event, as we have shown above, each spouse *does* hold valuable, separate rights in a tenancy by the entirety. See Pet. Br. 13-15; pages 1-3 & note 1, *supra*. Indeed, the precise issue presented in this case concerns the separate right of the delinquent spouse to receive 50% of the proceeds of the sale of the property. See page 3, *supra*; Pet. App. 46a-47a.

held that the fact that the taxpayer was not able to exercise his rights separately from the rights of his spouse was *not* a basis for denying foreclosure of the federal tax lien. 461 U.S. at 700-702. The Court emphasized in *Rodgers* that neither the "homestead estate * * * claimed by a nondelinquent spouse" nor the "state-created exemptions against forced sale" precluded judicial enforcement of the federal tax lien. *Id.* at 701.

Respondent also errs in stating that in *Rodgers* "the majority halfheartedly embraced" her argument that "the lien statute * * * does not cover tenancies by the entirety." Resp. Br. 30. The Court in *Rodgers* plainly did *not* accept that contention. The Court noted that a "line of cases" had held "that, as a result of the peculiar legal fiction governing tenancies by the entirety in some States, no tax lien could attach in the first place because neither spouse possessed an independent interest in the property." 461 U.S. at 703 n.31. The Court observed, however, that in such cases the government was "merely trying to exercise one of the more benign rights of a lienholder" and emphatically questioned "*if* the tenancy by the entirety cases are correct." *Ibid.* As we discuss above (page 11, *supra*), the Court in *Rodgers* then reviewed the legislative history of the proposed 1954 amendment to clarify the application of the tax lien to the interest of a taxpayer in a tenancy by the entirety and stated that the failure of the Senate to adopt the amendment appeared not to be "because it disagreed with it, but more likely because it found it superfluous." *Id.* at 704 n.31.[14]

[14] The Court in *Rodgers* also plainly did not embrace respondent's novel proposition that the difference in the wording of Sections 6321 and 7403 indicates that the tax lien statute "was not designed to cover all conceivable interests in property." Resp. Br. 21, 30. See pages 12-13, *supra*; S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 869

These passages in *Rodgers*, which dispute the "line of cases" and the legislative history on which respondent relies, cannot properly be described as a "halfhearted" *acceptance* of her position.

6. Respondent argues that "countless questions" would be raised if the federal tax lien applies to property held in a tenancy by the entirety. Resp. Br. 33. Among the questions raised by respondent are (i) whether the federal tax lien would be subject to the survivorship right of a nondelinquent spouse;[15] (ii) if so, whether the IRS would seek immediate foreclosure in every case like this;[16] and (iii) how the value of the taxpayer's interest is then to be determined.[17]

None of these questions is unique to entirety property. See, *e.g.*, note 17, *supra*. They arise whenever any type of jointly-owned property is subjected to the federal tax lien for the tax debts of only one of the owners.[18] See, *e.g.*,

(1995) ("*Rodgers* * * * renders the entireties bar [to tax collection] hard to defend.").

[15] The answer to this question is ordinarily "yes," because the United States steps into the shoes of the delinquent taxpayer.

[16] As reflected in the facts of the present case and of a long line of similar cases, the answer to this question is "no."

[17] The answer to the valuation issue has factual variations, but the "rough idea" is discussed in a detailed example given by this Court in *United States* v. *Rodgers*, 461 U.S. at 698.

[18] Respondent's suggestion (Resp. Br. 32) that the government's position would adversely affect the marketability of titles ignores the fact that the Michigan bar has long warned title examiners that, in view of the 1975 enactment of Michigan's Married Women's Property Act (Mich. Comp. Laws Ann. § 557.71 (West 1988)), it would be risky to ignore a federal tax lien against one of two spouses owning entirety property. See C.A. App. 107-108 (Standard 20.2 of the *Michigan Land Titles Standards* (5th ed.), published by the State Bar of Michigan, Real Property Section). Moreover, in 1983, this Court itself questioned the validity of appellate decisions that had then held the tax lien inapplicable to tenancies by the entirety in *United States* v. *Rodgers*, 461 U.S. at 702-704 n.31.

United States v. *Rodgers*, *supra* (homestead property); *O'Hagan* v. *United States*, *supra* (jointly owned property). The necessity of resolving these issues is simply one of the "practical consequences" of the failure of one of the joint owners to pay taxes as they come due. *United States* v. *Rodgers*, 461 U.S. at 698. These "practical consequences" have not prevented the prompt and efficient application and enforcement of the federal tax lien to every *other* type of jointly-owned property. See Pet. Br. 26-27.

Respondent nonetheless asserts that special treatment is warranted in this case because a tenancy by the entirety is "different" from other types of joint ownership. Resp. Br. 40. As this Court has observed, however, there is "sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation." *United States* v. *Jacobs*, 306 U.S. 363, 370 (1939). The Court has emphasized that (*ibid.*) (footnote omitted):

> [a] tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person." Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each.

7. Finally, respondent incorrectly states (Resp. Br. 12) that the "ready availability of fraudulent-conveyance statutes" demonstrates that the government is "more than amply equipped" to collect tax liabilities. One need look no further than the present case to see the error in that contention. Fraudulent conveyance laws have provided no meaningful assistance to the government in either this case or other similar cases: courts have reasoned that, if entirety property is exempt from creditor execution under state law, then the transfer of that property between spouses cannot

represent a fraudulent conveyance under state law.[19] Pet. App. 81a-83a. For example, in the present case, the United States was able to recover only the small amount of payments made by the taxpayer that enhanced the value of the property while he was insolvent. *Id.* at 85a-86a. That "fraudulent enhancement" theory enabled the government to collect only $6693 of a tax liability which, with interest, exceeds $482,446. *Id.* at 45a, 92a.

Other taxpayers have consciously employed the tenancy by the entirety wholly to avoid their tax obligations. See Pet. Br. 31. It is, as we have stressed, "difficult to conceive of a more simple or widely available method of evading the collection of taxes." *Ibid.* The decision of the court of appeals should be rejected not only because it "contravenes established precedent" but also because it "provides an avenue for easy avoidance of federal income-tax laws." Pet. App. 69a (Ryan, J.).

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[19] Respondent is also wide of the mark in suggesting (Resp. Br. 12, 22) that the enactment of an unlimited marital deduction for the gift tax indicates that a transfer of entireties property between spouses is a permissible means of tax avoidance. The marital deduction avoids the application of the *gift tax* on the transfer; it does not mean that property to which the federal tax lien has attached because of a delinquency in some *other* tax (such as the income tax) may be transferred free and clear of that lien. See *United States* v. *Bess*, 357 U.S. 51, 57 (1958) ("[t]he transfer of property subsequent to the attachment of the lien does not affect the lien").

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JANUARY 2002